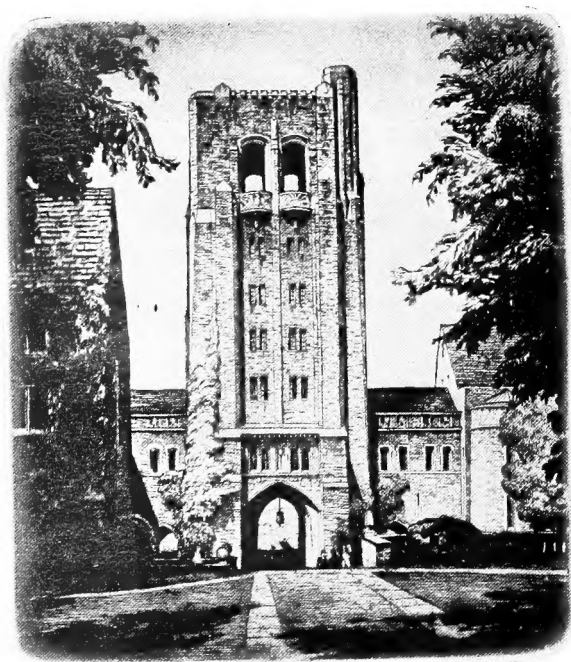


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THE
Powers, Duties and Liabilities
OF
SHERIFFS, CORONERS AND CONSTABLES,
WITH
NOTES OF JUDICIAL DECISIONS,
AND
PRACTICAL FORMS,

ADAPTED TO ALL THE STATES.

By BORDEN D. SMITH,

COUNSELLOR AT LAW.

ALBANY, N. Y.:
WEARE C. LITTLE & CO.,
LAW BOOKSELLERS AND PUBLISHERS,
1883.

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PREFACE.

SINCE the adoption of the Code of Civil Procedure, and the Criminal and Penal Codes, a work of the character of this volume appeared to be necessary to the officers whose powers, duties and liabilities are treated of; and with a view of supplying such necessity, as well as furnishing the practicing lawyer with much valuable aid, the present volume was written.

No work of this kind having been written for many years, the large collation of the decisions of the courts of this and other States, will, it is believed, be found especially useful to the lawyer.

While the statute law stated in the text is that of the State of New York, the general uniformity of the statutes upon these subjects in the different States, will, with the large number of references to decisions of the courts of other States, make the book useful in any State.

The references to the Revised Statutes are made to the fifth, sixth and seventh editions, for the better accommodation of all.

As the usefulness of a book of this nature depends very much upon the readiness with which the desired information may be found, especial pains has been taken in the arrangement of the work, and otherwise, to render it acceptable in this respect.

JOHNSTOWN, N. Y., *March*, 1883.

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PART I. OF SHERIFFS.

CHAPTER I.

OF THEIR OFFICE, AND THE QUALIFICATIONS THEREFOR; AND
HEREIN OF THEIR ELECTION, RESIGNATION AND REMOVAL.

SECTION I.

OF THE OFFICE, THE ELECTION AND QUALIFICATIONS.

1. *The Office.*—The sheriff is a county officer, representing the executive or administrative power of the State within his county. The name is derived from two Saxon words, *scyre*, shire, and *reve*, keeper.¹ The office is said by Camden to have been created by Alfred when he divided England into counties; but Lord Coke is of opinion that it is of still greater antiquity, and that it existed in the time of the Romans, the shire reeve being the deputy of the Earl (*comes*), to whom the custody of the shire was originally committed, and hence the deputy was known as *vice comes*.² The earls, by reason of their high employments and attendance on the king's person, were unable to transact the business of the county, and so laid the labor on the *vice comes*, shire reeve or sheriff, reserving unto themselves the honors. In process of time the sheriff became entirely independent of and not subject to the earl; the king, by his letters-patent, committing *custodiam comitatus* to him alone.³

Constitutional provisions for the election of sheriffs, by the election of counties, respectively, imply an establishment

¹ 2 Bouv. Law Dict., 518.

² Camden, 156; Coke Litt., 168a; Dalton's Sheriffs, 5.

³ 1 Blackst. Com., 338.

of the office of sheriff substantially as it was generally known and recognized throughout the country at the time the constitution was adopted. And the legislature cannot take from the sheriffs an important portion of the duties usually assigned to them.¹ Courts must judicially know who is sheriff of a particular county.²

2. *Election and Term of Office.*—At the general election there must be chosen, by the electors thereof, one sheriff in each county of the State, once in every three years, and as often as a vacancy shall happen.³ On the erection of a new county the sheriff shall be elected at the general election next succeeding the erection of the county, or at such other time as the legislature shall direct.⁴ So soon as a person shall have been duly determined to be elected, the county clerk must deliver to such person a certified copy of the determination showing such election;⁵ and must also, within twenty days after a general election, and within ten days after a special election, transmit to the secretary of state a list of names which shall contain the name of the person so elected, and his place of residence.⁶ The person elected, unless he be elected to supply a vacancy then existing, shall enter upon the duties of his office on the first day of January following the election at which he shall be chosen;⁷ and he shall continue in the performance of such duties until the commencement of his successor's term of office, and the service upon him of the certificate showing that his successor has duly qualified for the office.⁸ If one is elected to fill a vacancy, he holds the office for the full term, and until his successor qualifies and he is notified thereof.⁹ If a vacancy occur in the office of sheriff, and

¹ *State v. Brunst*, 26 Wis., 412.

² *Miller v. McMillan*, 4 Ala., 527.

³ Const., Art. 10, § 1; 1 R. S. (5th ed.), 379, § 13, 397, § 68; 419, § 1; id. (6th ed.), 377, § 1; id. (7th ed.), 337, § 1.

⁴ 1 R. S. (5th ed.), 401, § 89; id. (6th ed.), 406, § 110; id. (7th ed.), 360, § 50.

⁵ 1 R. S., (5th ed.), 439, § 21; id. (6th ed.), 444, § 21; id. (7th ed.), 392, § 21.

⁶ 1 R. S. (5th ed.), 439, § 22; id. (6th ed.), 444, § 22; id. (7th ed.), 392, § 22.

⁷ 1 R. S. (5th ed.), 408, § 3; id. (6th ed.), 414, § 3; id. (7th ed.), 365, § 3.

⁸ Code Civ. Pro., § 183; *Collins v. Nail*, 3 Dev. (N. C.), 457; *Akers v. State*, 8 Ind., 484.

⁹ *People v. Green*, 2 Wend., 266; *People v. Coutant*, 11 id., 132, 511; *State v. McClintock*, 1 McCord (S. C.), 245.

there be no under sheriff, and no coroner who qualifies, then the county judge of the county in which such vacancy occurs must appoint some suitable person to execute the office, until a sheriff shall be duly elected or appointed and qualified. Such appointment shall be in writing, under the hand and seal of the county judge, and shall be filed in the office of the county clerk, who shall forthwith give notice thereof to the person so appointed. And such person shall then, within six days after receiving such notice, qualify as a sheriff regularly elected in that county is required by law to qualify;¹ and be subject to all the duties, liabilities and penalties imposed by law upon a sheriff in that county duly elected and qualified.²

3. *Qualifications.*—To be capable of holding the office of sheriff, or any other civil office, one must, at the time of his election or appointment, be a citizen of this State, and have attained the age of twenty-one years;³ and he then must reside within the county in which the duties of his office are required to be executed.⁴ He can hold no other office,⁵ and he is ineligible for the same office for the next three years after the expiration of his term.⁶

It is not the province of the officer to whom application is made to administer the oath of office to determine whether the person presenting himself is or is not capable of holding the office. It is his duty on the production of the commission to administer the oath. If the appointment or election is improvidently made there is a legal mode in which it may be declared void.⁷

4. *Official Oath and Bond.*—Before the sheriff enters

¹ 1 R. S. (5th ed.), 879, §§ 177, 178, 179; id. (6th ed.), 908, §§ 243, 244, 245; id. (7th ed.), 968, §§ 82, 83, 84.

² 1 R. S. (5th ed.), 879, § 181; 415, § 57; id. (6th ed.), 908, § 246; 422, § 60; id. (7th ed.), 968, § 86; 372, § 49.

³ 1 R. S. (5th ed.), 407 § 1; id. (6th ed.), 414, § 1; id. (7th ed.), 365, § 1.

⁴ 1 R. S. (5th ed.), 383, § 13; id. (6th ed.), 383, § 15; id. (7th ed.), 349, § 15; *Patterson v. Miller*, 2 Met. (Ky.), 493; *State v. Smith*, 14 Wis., 497; *State v. Anderson, Coxe* (N. J.), 318.

⁵ Const. Art. 10, § 1; 1 R. S. (5th ed.), 397, § 68; id. (6th ed.) 402, § 93; id. (7th ed.), 360, §§ 47, 48; *Scott v. Strobach*, 49 Ala., 477; *Bunting v. Willis*, 27 Gratt. (Va.), 144.

⁶ 1 R. S. (5th ed.), 397, § 68; id. (6th ed.), 402, § 93; id. (7th ed.), 360, § 48.

⁷ *People v. Dean*, 3 Wend., 438; *State v. Anderson, Coxe* (N. J.), 318.

upon the duties of his office, and within fifteen days after he has been notified of his election or appointment, or within fifteen days after the commencement of his term of office, he must take and deposit within the office of the clerk of his county the constitutional oath of office.¹ And he shall, within twenty days after being notified of his election, and before he shall enter upon the execution of the duties of his office, execute with two or more sureties, who shall be freeholders, a joint and several bond to the people of this State in the penal sum of \$20,000, if he be sheriff of the city and county of New York; and of \$10,000 if he be sheriff of any other of the counties. Such bond shall be filed in the clerk's office of the county for which the sheriff executing it shall have been elected; and the clerk must, at the time of filing the same, administer an oath to each of the sureties named therein, that he is a freeholder within this State, and worth, if in the city and county of New York, the sum of \$20,000, and if in any other county, such sum as shall be proportionate to the number of sureties bound in such bond, and to the amount of the bond required in such county, over and above all debts whatsoever owing by him; which oath shall be indorsed on the bond and subscribed by each of the sureties in the presence of the clerk, who shall, notwithstanding, judge of and determine the competency of such sureties. And within twenty days after the first Monday in January in each year subsequent to that in which he shall have entered on the duties of his office, the sheriff must renew the security so as above required to be given by him; and this renewed security must be in the same amount, and be given in the same manner and be subject in all respects to the same regulations as such original security. If for any reason the county clerk may not act in the matter the county judge must perform his duties in the premises.²

In addition to the bond so required to be given, a sheriff must execute a bond for the payment of all moneys by him

¹ 1 R. S. (5th ed.), 410, § 24; 411, §§ 25, 29; subd. 6; id. (6th ed.), 417, §§ 24, 25; 418, § 28, subd. 6; id. (7th ed.), 367, §§ 20, 21; 368, § 24, subd. 6.

² 1 R. S. (5th ed.), 876, 877, § 162-165; 1 id. (6th ed.), 905, § 227; 906, § 230; id. (7th ed.), 965, § 67; 966, § 70; Consol. Act of 1832, § 1714; *Bosworth v. Heys*, 46 Ga., 635.

collected under the provisions of the Military Code (Laws of 1870, chap. 80), and his sureties will be liable for any official delinquencies on the part of their principal under said act. Such bond is to be approved by the county judge of the county in which the sheriff resides.¹

It has been decided that it is enough if the sheriff give the requisite bond within fifteen days after the commencement of his term.²

The bond is in force, and obligatory upon the principal and sureties therein, so long as the principal continues to discharge the duties of his office, and until his successor is appointed and has duly qualified.³ But the sureties thereon are exonerated from all liability by reason thereof, for all acts or omissions of the principal after he has duly renewed such bond.⁴ The sureties on the bond of the sheriff are liable for all official delinquencies of which the principal may be guilty.⁵ And when there is a vacancy in the office of sheriff, and the under sheriff acts as sheriff, they are also liable for all the official delinquencies of which the under sheriff may be guilty.⁶

Where the sheriff is liable for the escape of a prisoner committed to his custody, or is guilty of any other actionable default or misconduct in his office, the person injured thereby may apply to the Supreme Court, or to a Superior City Court having jurisdiction, for leave to prosecute the sheriff's official bond. The application must be accompanied by proof by affidavit of the default or misconduct complained of, and that satisfaction has not been received; and by a certified copy of the official bond.⁷ Upon such an application the court must grant an order, permitting the

¹ Laws of 1870, chap. 80, § 218; 1 R. S. (7th ed.), 780, § 218.

² *People v. Holley*, 12 Wend., 481; *Hall v. Luther*, 13 id., 491.

³ 1 R. S. (5th ed.), 412, § 35; id. (6th ed.), 418, § 33; id. (7th ed.), 368, § 29; *Vann v. Pipkin*, 77 N. C., 408; *Dunphy v. Whipple*, 25 Mich., 10.

⁴ 1 R. S. (5th ed.), 412, § 35; id. (6th ed.), 418, § 34; id. (7th ed.) 369, § 30; see *People v. Ten Eyck*, 13 Wend., 448.

⁵ *People v. Schuyler*, 4 N. Y., 173; *People v. Brush*, 6 Wend., 454; Code Civ. Pro., § 588; *State v. Prime*, 54 Ind., 450; *State v. Kelly*, 43 Tex., 667; *O'Bannon v. Sanders*, 24 Gratt. (Va.), 138.

⁶ 1 R. S. (5th ed.), 877, § 167; id. (6th ed.), 906, § 232; id. (7th ed.), 966, § 72; *Ward v. Storey*, 18 Johns., 120.

⁷ Code Civ. Pro., § 1880.

applicant to maintain an action upon the bond. The action must be brought in the court which granted the order by the applicant as plaintiff; and it may be maintained as if the applicant was the obligee named in the bond;¹ except where the default consists of the non-payment of money, and special provision is not otherwise made by law, the applicant must prove a demand of the money from the sheriff, or that a demand cannot be made by due diligence. But such proof is unnecessary, where the applicant has recovered a judgment against the officer.² The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain, from the court which made the first order, but not from any other court, an order, permitting him to maintain another action, in the same court upon the same bond, for another default or misconduct. Any number of such orders may be successively made; and neither of the actions authorized thereby is affected by the pendency of, or the recovery of judgment in, any other, except as hereinafter in this section seen.³

Where an execution is issued upon a judgment, recovered against the sheriff and any of his sureties, in an action brought as above described, the plaintiff's attorney must indorse thereon a direction to collect the same, in the first place, out of the property of the sheriff, and, if sufficient property of the sheriff cannot be found, then to collect the deficiency out of the property of the surety or sureties.⁴

The application above described may be made without notice; but in that case the sheriff, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground showing it ought not to have been granted.⁵

It is a defense by a surety, against whom an action is brought upon a sheriff's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the sheriff, to pay, upon one or

¹ Code Civ. Pro., § 1881; but see *People v. Connor*, 8 Hun, 533, where it is held that the granting of the order is discretionary.

² Code Civ. Pro., § 1891; and see *Rhineland v. Mather*, 5 Wend., 102.

³ Code Civ. Pro., § 1882.

⁴ Code Civ. Pro., § 1883.

⁵ Code Civ. Pro., § 1892; and see *Matter of Chamberlain*, 28 How. Pr., 1.

more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers fees, and expenses, and equal to the sum for which the defendant is liable, by reason of the bond. It is a partial defense, that the difference between the aggregate amount so paid, or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.¹

If the aggregate amount of the liabilities, which might be recovered by action upon the sheriff's official bond, exceeds the sum for which the sureties are liable, the court must, upon the application of a person who has obtained leave to prosecute the bond, made upon notice to the plaintiff's attorney, in each action then pending upon the sheriff's official bond, and in each uncollected judgment recovered thereupon, direct and provide for the distribution of the money collected out of the property of the sureties, among the persons in favor of whom the liabilities have accrued, in proportion to the amount which each one is entitled to recover; to be ascertained by a reference, or in such other manner as the court directs. For the purpose of the motion, an order may be made by a judge, forbidding the payment, to the plaintiff in any action, of the sum collected, or to be collected, by virtue of a judgment therein. But a plaintiff cannot be compelled to refund any money, collected and received by him in good faith, before service or notice of such an order.²

If the sheriff execute any of the duties and functions of his office, without having taken and subscribed the oath of office required by law, or without having executed and filed in the proper office any bond required of him by law, he shall forfeit the office, and shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment.³ But whatever of the duties he performs without having duly qualified are deemed valid as respects the public, and third persons having any interest in the acts done. The office does not become *ipso facto* vacant, but there must be a direct judicial

¹ Code Civ. Pro., § 1884.

² Code Civ. Pro., § 1885.

³ 1 R. S. (5th ed.) 412, § 36; id. (6th ed.), 418, § 35; id. (7th ed.), 369, § 31; Penal Code, § 42; Const., Art. 10, § 1; *Sprowl v. Lawrence*, 33 Ala., 674.

or other authorized proceeding on the part of the proper authority to enforce the forfeiture.¹

Where a new sheriff has been elected or appointed, and has qualified, and given the security required by law, the clerk of the county must furnish to the new sheriff a certificate, under his hand and official seal, stating that the person so appointed or elected has so qualified and given security.² When his term of office commences, the new sheriff should serve this certificate upon the former sheriff.³

SECTION II.

OF VACANCIES IN THE OFFICE; AND HOW THEY MAY HAPPEN, AND BE FILLED.

1. *When the Office Becomes Vacant.*—The office of sheriff becomes vacant by reason of—the death of the incumbent; his resignation; his removal from office; his ceasing to be an inhabitant of the county within which the duties of his office are required to be discharged; his conviction of an infamous crime or of any offense involving a violation of his oath of office; his refusal or neglect to take the oath of office within the time required by law; or to give or renew any bond within the time prescribed by law; the decision of a competent tribunal declaring void his election or appointment;⁴ the governor declaring the office vacant because of a judgment against the sheriff for a breach of the condition of his official bond,⁵ or because of the sheriff being for thirty days in custody upon an execution or attachment for the non-payment of moneys received by him by virtue

¹ Penal Code, § 43; *Foot v. Stiles*, 57 N. Y., 399, 401; *People v. Hopson*, 1 Denio, 574; *Morse v. Calley*, 5 N. H., 223; *Fowler v. Beebe*, 9 Mass., 231; *Brown v. Grover*, 6 Bush. (Ky.), 1; *Ballard v. Thomas*, 19 Gratt. (Va.), 14; *Dunphy v. Whipple*, 25 Mich., 10; *Comm'rs of Ramsey Co. v. Brisbin*, 17 Minn., 451; *Vann v. Pipkin*, 77 N. C., 408; *Ex parte Candee*, 48 Ala., 386.

² Code Civ. Pro., § 182.

³ Code Civ. Pro., § 183; *Curtis v. Kimball*, 12 Wend., 276.

⁴ 1 R. S. (5th ed.), 413, § 40; id. (6th ed.), 420, § 40; id. (7th ed.), 370, § 34; *Davis v. State*, 35 Tex., 118; *Bosworth v. Heys*, 46 Ga., 635; *Merrill v. Palmer*, 13 N. H., 184; *Catching v. Davis*, 3 B. Monr. (Ky.), 61.

⁵ 1 R. S. (5th ed.), 414, § 46; id. (6th ed.), 421, § 46; id. (7th ed.), 371, § 40.

of his office;¹ his accepting and qualifying for another office incompatible with the first.² And it would seem that where a new county is formed comprising part of the territory of an old county, the office of sheriff of the old county becomes vacant if he reside in the part of which the new county is made.³

2. *Resignation*.—The resignation of the office of sheriff must be made directly to the governor.*

3. *Removal*.—The governor may remove a sheriff on charges made against him within the term for which he shall have been elected; but he must first give to him a copy of the charges against him, and an opportunity of being heard in his defense.⁵ The governor should direct the district attorney of the county in which the sheriff resides to conduct an inquiry into the truth of the charges made, and the district attorney should give at least eight days' notice to the sheriff of the time and place when he will proceed to the examination of witnesses before some judge of the county courts.⁶

The district attorney may issue process of subpoena in his own name, and with the like effect as in cases of complaints before a grand jury, to compel the attendance of any witness whom he shall deem material, before the county judge, who shall have the same power to enforce obedience by attachment and to commit any person who shall refuse to be sworn or to answer, as the court of common pleas would have in a civil cause pending therein.⁷ And the sheriff, on his application to the district attorney or to any justice of the peace, is entitled to the like process of subpoena to be enforced in the like manner.⁸ At the time and

¹ 1 R. S. (5th ed.), 878, § 172; id. (6th ed.), 907, § 237; id. (7th ed.), 967, § 77.

² Const. Art. 10, § 1; *People v. Carrique*, 2 Hill, 93; *Bunting v. Willis*, 27 Gratt. (Va.), 144; *Paddock v. Cameron*, 8 Cow., 212.

³ 1 R. S. (6th ed.), 420, § 40, subd. 4; id. (7th ed.), 370, § 34, subd. 4; id. (5th ed.), 413, § 40, subd. 4; *People v. Morrell*, 21 Wend., 563.

⁴ 1 R. S. (5th ed.), 413, § 38, subd. 4; id. (6th ed.), 420, § 38, subd. 4; id. (7th ed.), 370, § 33, subd. 4.

⁵ Const. Art. 10, § 1; 1 R. S. (5th ed.), 414, § 51; id. (6th ed.), 421, § 51; id. (7th ed.), 371, § 44.

⁶ 1 R. S. (5th ed.), 414, § 52; id. (6th ed.), 421, § 52; id. (7th ed.), 371, § 45.

⁷ 1 R. S. (5th ed.), 415, § 53; id. (6th ed.), 421, § 53; id. (7th ed.), 371, § 46.

⁸ 1 R. S. (5th ed.), 415, § 54; id. (6th ed.), 421, § 54; id. (7th ed.), 371, § 47.

place specified in the notice, the county judge should proceed to take the testimony of all the witnesses produced before him by the district attorney and by the accused sheriff, he, having first sworn the witnesses; every answer given in thus taking the testimony to any question which either party shall so require must be reduced to writing; and the testimony of each witness shall be read to, and subscribed by, him, and be certified by the judge taking the same, and delivered to the district attorney, to be by him transmitted to the governor.¹ But the governor may direct that the testimony be taken and the examination of the witnesses be had before himself or before a commissioner appointed by him for that purpose with the same effect as if taken and had before the county judge, the governor or his commissioner being invested with the power of the county judge in the premises. And for that purpose the governor may in a writing to be filed in the secretary of state's office appoint such commissioner, supercede such appointment and appoint a new commissioner whenever it shall appear to be necessary. In such case the governor can direct the district attorney of the county where the sheriff resides, or the attorney general, to conduct the inquiry and examination, at a place within such county to be fixed by the governor or by the commissioner, in like manner and with like power and authority, as if the proceedings were before the county judge; the sheriff, too, is entitled to process and enforcement thereof as before the county judge. All false swearing in these proceedings will be deemed perjury and punishable as such. And all officers to whom process in the proceedings is directed and delivered must execute the same without any unnecessary delay.²

Where a vacancy occurs in the office of sheriff, except because of the death of the incumbent, the governor must appoint some fit person who was eligible to the office to execute the duties thereof until it shall be supplied by an election.³ And where a sheriff elected by the people is

¹ 1 R. S. (5th ed.), 415, § 55; id. (6th ed.), 422, § 55; id. (7th ed.), 372, § 48; *Davis v. State*, 35 Tex., 118.

² Laws of 1866, chap. 629.

³ 1 R. S. (5th ed.), 415, § 56; id. (6th ed.), 422, § 56; id. (7th ed.), 372, § 49.

removed, and the governor appoints a person to perform the duties of the office, he may, at any time before a new sheriff is elected, remove the person so appointed, *though no charges* are preferred against him, and appoint another in his place.¹ A removal upon charges is confined to the officer who has been elected by the people.²

4. *Forfeiture*.—A sheriff who willfully violates any of the provisions of sections 110 to 124 inclusive of the Code of Civil Procedure relating to the execution of a mandate against the person, forfeits to the person aggrieved treble damages, and is guilty of a misdemeanor and liable to be punished accordingly. And a conviction for any such violation operates as a forfeiture of his office.³ So, too, if he knowingly suffers liquor or wine to be sold or used in the jail contrary to the provisions of sections 128 and 129, Code Civil Procedure; he is guilty of a misdemeanor, and upon conviction therefor forfeits his office.⁴ And if he, or any other person elected or appointed to an executive office, asks, receives or agrees to receive any bribe, upon an agreement or understanding that his action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, he may be punished by imprisonment in a State's prison not exceeding ten years, or by a fine not exceeding \$5,000, or by both; and in addition thereto he forfeits his office, and is forever disqualified from holding any public office under this State.⁵ And if he, for any reward, consideration or gratuity, paid or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments or perform any of its duties, he is guilty of a misdemeanor, and a conviction for the same forfeits his office, and disqualifies him forever from holding any office under this State.⁶ And if he asks or receives any gratuity or reward, or any promise

¹ *People v. Parker*, 6 Hill, 49.

² *Id.*; Const. Art. 10, § 1; 1 R. S. (5th ed.), 414, § 51; *id.* (6th ed.), 421, § 51; *id.* (7th ed.), 371, § 44.

³ Code Civ. Pro., § 125.

⁴ Code Civ. Pro., § 130.

⁵ Penal Code, §§ 45, 72; *Hennessey v. Hill*, 52 Ill., 281.

⁶ Penal Code, § 54; *Addington v. Sextons*, 17 Wis., 327.

thereof, for appointing another person, or procuring for another person an appointment, to a public office or to a subordinate position in such an office, he is guilty of a misdemeanor, and a conviction also forfeits his office.¹

A sheriff, or other officer or person, who allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large, except as permitted by law, or connives at or assists such escape, or omits any act or duty whereby such escape is occasioned, or contributed to, or assisted, is, if he corruptly and willfully allows, connives at or assists the escape, guilty of a felony, and if convicted therefor he forfeits his office, and is forever so disqualified to hold any office, or place of trust, honor or profit under the constitution or laws of this State.² And if he receives any gratuity or reward, or any security or promise of one, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape is attempted or not is guilty of a misdemeanor and upon conviction therefor he forfeits his office, and is forever disqualified from holding office of trust, honor or profit, under the constitution and laws of the State.³ So, too, if he, in violation of a duty imposed upon him by law, to receive a person into his official custody, or into a prison under his charge, willfully neglects or refuses so to do.⁴

If the sheriff on appointing a deputy, takes an agreement for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void as in violation of the statute against selling offices. But where he reserves a part of the fees of the office, or a sum certain, which is to come out the profits, the contract is good.⁵

¹ Penal Code, § 53; *Tappan v. Brown*, 9 Wend., 175; *Gray v. Hook*, 4 N. Y., 449.

² Penal Code, §§ 89, 90.

³ Penal Code, §§ 115, 723; 3 R. S. (5th ed.), 965, §§ 21, 22; *id.* (6th ed.), 961, §§ 30, 31; *id.* (7th ed.), 2507, § 18; 2508, § 19.

⁴ Penal Code, §§ 116, 723; 3 R. S. (5th ed.), 965, §§ 21, 22; *id.* (6th ed.), 961, §§ 30, 31; *id.* (7th ed.), 2507, § 18; 2508, § 19.

⁵ *Mott v. Robbins*, 1 Hill, 21; *Tucker v. Streetman*, 38 Tex., 71; *Martin v. Wade*, 37 Col., 168; *Hale v. Gavitt*, 18 Ind., 390; *Pioneer, etc., Co. v. Sanbom*, 3 Minn., 413.

But if he takes a bond to indemnify him in not taking a defendant to prison on a *ca. sa.* he cannot recover on it.¹

5. *Vacancy, How Filled.*—When there is a vacancy in the office of the sheriff, the under sheriff, or if there be none, one of the coroners of the county, or if none qualify, a person to be appointed by the county judge, must discharge the duties of sheriff until a sheriff is elected or appointed and duly qualified.² If any vacancy be not supplied at the general election next succeeding the happening thereof, a special election to supply the vacancy must be held.³ But no special election can be held within forty days previously to a general election.⁴ And when the election is held pursuant to the governor's proclamation, it must be held not less than twenty nor more than forty days from the date of the proclamation.⁵

On a vacancy in the office of sheriff happening otherwise than by death, the duties of the office devolve on the coroner.⁶ And where a sheriff and a coroner are both interested, elisors will be appointed to execute a writ of possession.⁷

¹ *Love v. Palmer*, 7 Johns., 159; *Richmond v. Roberts*, id., 319; *Reed v. Pruyn*, id., 426; *Webber v. Blunt*, 19 Wend., 188; *Devlin v. Brady*, 36 N. Y., 531; *S. C.*, 32 Barb., 518.

² 1 R. S. (5th ed.), 877, § 167; 878, § 173; 879, § 177; 415, §§ 56, 59; id. (6th ed.), 906, § 232; 907, § 238; 908, § 242; 422, §§ 56–59; id. (7th ed.), 966, § 72; 967, § 78; 968, § 82; 372, § 49; *Turner v. Billagram*, 2 Cal., 520.

³ 1 R. S. (5th ed.), 420, § 9; id. (6th ed.), 429, § 9; id. (7th ed.), 380, § 9.

⁴ 1 R. S. (5th ed.), 419, § 4; id. (6th ed.), 428, § 4; id. (7th ed.), 379, § 4.

⁵ 1 R. S. (5th ed.), 420, § 11; id. (6th ed.), 429, § 11; id. (7th ed.), 380, § 11.

⁶ *Paddock v. Cameron*, 8 Cow., 212.

⁷ *Eden v. Chew*, 3 Cow., 298.

CHAPTER II.

OF THE APPOINTMENT OF UNDER SHERIFFS AND DEPUTIES;
AND HEREIN OF THE POWERS AND DUTIES OF SHERIFFS
GENERALLY; AND OF THEIR DISABILITIES.

SECTION I.

OF UNDER SHERIFFS, DEPUTIES AND JAILERS.

1. *Under Sheriffs and Deputies.*

Sheriff must Appoint.—The sheriff of each county in this State shall, as soon as may be after he takes upon himself the execution of his office, appoint some proper person under sheriff of the same county, to hold during the pleasure of such sheriff; and as often as a vacancy shall occur in the office of such under sheriff, or he become incapable of executing the same, another shall, in like manner, be appointed in his place.¹ He must also appoint such and so many deputies as he may think proper.²

Every appointment of an under sheriff, or of a deputy sheriff, must be by writing, under the hand and seal of the sheriff, and must be filed and recorded in the office of the clerk of the county;³ and every under sheriff or deputy must, before he enters on the duties of his office, take the oath of office prescribed by the constitution.⁴

¹ 1 R. S. (5th ed.), 877, § 166; id. (6th ed.), 906, § 231; 2 id. (7th ed.), 966, § 71.

² 1 R. S. (5th ed.), 877, § 168; id. (6th ed.), 906, § 233; 2 id. (7th ed.), 966, § 73; Boardman v. Halliday, 10 Paige, 230.

³ 1 R. S. (5th ed.), 877, § 169; id. (6th ed.), 906, § 234; 2 id. (7th ed.), 966, § 74; Dane v. Gilmore, 51 Me., 544; Matthis v. Pollard, 3 Kelly (Ga.), 1; McGee v. Eastis, 3 Stew. (Ala.), 307; Haines v. Lindsay, 4 Ham. (O.), 88.

⁴ 1 R. S. (5th ed.), 878, § 169; id. (6th ed.), 906, § 234; 2 id. (7th ed.), 966, § 74; Allen v. Smith, 7 Halst. (N. J.), 159.

Vacancy in Office of Sheriff, how Filled.—Whenever a vacancy occurs in the office of sheriff of any county, the under sheriff of that county shall, in all things, execute the office until a sheriff be elected or appointed and duly qualified.¹ But the death, removal from office or resignation of the sheriff, vacates the office of all the other of his appointees.² But a deputy sheriff may complete an execution by sale and conveyance, after the sheriff goes out of office, provided the execution was levied before.³ He cannot, however, complete an execution after removal from the county; it is a virtual resignation of the office.⁴

Resignation of Under Sheriff or Deputy.—Under sheriffs and deputies are officers known to the law, and as such their official acts are valid.⁵ And they may resign to the sheriff, but their resignation need not be under seal, and, when it is tendered, the office becomes vacant, the sheriff being bound to receive it; and their sureties are not responsible for any acts of his done thereafter.⁶ It is the duty of a sheriff to make the best appointments for under sheriff and deputies in his power, according to his judgment at the time he makes it; and a promise by him, though for a valuable consideration, to appoint a certain person to either office, is void as against public policy.⁷

Powers of Under Sheriffs and Deputies.—An under sheriff or deputy, by virtue of his appointment, has authority to execute all the ordinary duties of sheriff; and, while the sheriff is in the execution of his office, the under sheriff has no more power than any other general deputy.⁸

¹ 1 R. S. (5th ed.), 877, § 167; id. (6th ed.), 906, § 232; 2 id. (7th ed.), 966, § 72.

² Boardman v. Halliday, 10 Paige, 230; Greenwood v. State, 17 Ark., 332.

³ Jackson v. Collins, 3 Cow., 89; and see Owens v. Ranstead, 22 Ill., 161; Welsh v. Joy, 13 Pick., 477; Tuttle v. Jackson, 6 Wend., 215; People v. Baker, 20 Wend., 602; Jackson v. Tuttle, 9 Cow., 232.

⁴ Ferguson v. Lee, 9 Wend., 258.

⁵ 1 R. S. (5th ed.), 877; §§ 166, 168; id. (6th ed.), 906, §§ 231, 233; 2 id. (7th ed.), 966, §§ 71, 73; Dayton v. Lynes, 30 Conn, 351.

⁶ Gilbert v. Luce, 11 Barb. 91; 1 R. S. (5th ed.), 413, § 33, subd. 6; Towns v. Harris, 13 Tex., 507; Eastman v. Curtis, 4 Vt., 616.

⁷ Hager v. Catlin, 18 Hun, 448.

⁸ Tillotson v. Cheatham, 2 Johns., 63; Allen v. Smith, 7 Halst. (N. J.), 159; President, etc., of Brooklyn v. Patchin, 8 Wend., 47; Ramsey v. Strowbach, 52 Ala., 513; State v. Wilson, 12 La. Ann., 189.

In some respects, however, the powers and duties of an under sheriff are more extensive than those of a deputy. Thus he may, by an instrument in writing, deputize a person to do particular acts.¹ He may attend upon the drawing of juries for the courts of his county,² and he may superintend the execution of a criminal.³ In these cases deputies cannot act; but a sheriff may summon jurors by deputy.⁴ All the acts of the under sheriff, *as such*, and of the deputies, must be done by them in the name of their principal.⁵ So in the name of his principal a deputy may execute a deed of land sold under execution.⁶ And if he take a judgment against a purchaser, in his principal's name, and include therein a private demand of his own, he cannot control the judgment; it belongs to the sheriff.⁷ And neither an under sheriff, *as such*, nor a deputy can do any act to affect the sheriff after the relation between them has ceased.⁸ If the relation ceases because of a vacancy in the office of sheriff, the under sheriff, as sheriff, executes all process in the hands of the sheriff or his deputies, except where process had been partially executed by a deputy.⁹ For the purpose of performing the unfinished business he has all the powers of a sheriff. He is a *quasi* sheriff. He may levy on property and sell on execution. He may, if resisted, call on "the power of the county" to aid him.¹⁰ But any default or misfeasance in office of such under sheriff in the meantime, is deemed a breach of the condition of the bond given by the sheriff who appointed him.¹¹ And the deputies of the former sheriff are not the deputies

¹ 1 R. S. (5th ed.), 877, § 168; id. (6th ed.), 906, § 233; 2 id. (7th ed.), 966, § 73; *Hunt v. Burrell*, 5 Johns., 137; *post*, subd. 3.

² Code Civ. Proc., § 1044.

³ Code Crim. Pro., § 507.

⁴ *People v. McGeery*, 6 Park., 653; *Brooklyn v. Patchen*, 8 Wend., 47.

⁵ *Simonds v. Catlin*, 2 Caines, 61; *Terwilliger v. Wheeler*, 35 Barb., 621; *Colvin v. Holbrook*, 2 N. Y., 126; *Ryan v. Eads*, Breese (Ill.), 168.

⁶ *Masten v. Bush*, 10 Johns., 223; *Randall v. Davis*, 18 id., 7; *Harris v. Lindsay*, 4 Ham. (O.), 88; *Rockbold v. Barnes*, 3 Rand. (Va.), 473.

⁷ *Wilson v. Gale*, 4 Wend., 623.

⁸ *Blake v. Shaw*, 7 Mass., 505; *Ballance v. Loomis*, 22 Ill., 82; *ante*, subd. 1.

⁹ Id.; *Ward v. Storey*, 18 Johns., 120; Code Civ. Pro., §§ 1388, 1475.

¹⁰ *Newman v. Beckwith* 61 N. Y., 205, 211.

¹¹ 1 R. S. (5th ed.), 877, § 167; id. (6th ed.), 906, § 232; 2 id. (7th ed.), 666, § 72; *Newman v. Beckwith*, *supra*.

of such under sheriff, acting as sheriff. In order that they may act as such, they must be newly appointed in the manner which the law prescribes for the appointment of deputies by a sheriff.¹ But where the office of sheriff devolves upon the under sheriff, and the general deputies of the former sheriff continue to act as the deputies of such under sheriff, and with his knowledge and assent, but without a new appointment according to law, *it seems* they will be regarded as deputies *de facto* of such under sheriff, so as to make their acts as such deputies valid as to third persons.²

2. *Special Deputies.*

How Appointed.—Any sheriff or under sheriff, by an instrument in writing, may depute persons to do particular acts.³ But neither can delegate to another the power to make such or any other appointment.⁴ Nor can either depute a person to do an act, such as the attendance upon the drawing of juries, which the law prescribes that the sheriff or under sheriff must do in person; or such an act as the law says must be done by one of them, or by a general deputy, as the taking of a prisoner to a State prison or to a house of refuge. The appointment of a special deputy need not be under seal, nor be filed and recorded, and the special deputy need not take the oath of office.⁵ But in States where the appointment need not be in writing, a special deputy cannot be constituted to serve even an original writ, by a mere verbal command, without delivery of the writ.⁶

Not a Public Officer.—A special deputy of a sheriff is, in

¹ Boardman v. Halliday, 10 Paige, 230; 1 R. S. (5th ed.), 877, §§ 168, 169; id. (6th ed.), 906, §§ 233, 234; 2 id. (7th ed.), 966, §§ 73, 74.

² Boardman v. Halliday, *supra*; ante, subd. 4, § 1, chap. 1.

³ 1 R. S. (5th ed.) 877, § 168; id. (6th ed.), 906, § 233; 2 id. (7th ed.), 966, § 73; Hunt v. Burrell, 5 Johns, 137; McGuffie v. State, 17 Ga., 497; McCracken v. Todd, 1 Kan., 148; Merrill v. Palmer, 13 N. H., 184; Guyman v. Burlingame, 36 Ill., 201; State v. Kizer, 4 Sneed. (Tenn.), 563; New Albany, etc., R. R. Co. v. Grooms, 9 Ind., 243; Wilford v. Miller, 1 Morris (Iowa), 405; Kavanaugh v. State, 41 Ala., 399; People v. Moore, 2 Doug. (Mich.), 1.

⁴ Penal Code, § 54; Perkins v. Reed, 14 Ala., 536; Montgomery v. Scantland, 2 Yerg. (Tenn.), 337.

⁵ 1 R. S. (5th ed.), 877, § 169; id. (6th ed.), 906, § 234; 2 id. (7th ed.), 966, § 74.

⁶ Meyer v. Bishop, 27 N. J. Eq., 141.

no sense, a public officer, but merely the private agent or officer of the sheriff, and neither his appointment nor his relation to the sheriff can be presumed from his acts;¹ and the party for whom a special deputy executes process, is answerable in trespass, if the deputy had not the authority of the law, but only the direction of the party. So, also, if the party assented to the unnecessary violence of the deputy, however he may have been appointed.²

Power to Appoint Specially, how Limited.—A sheriff may not *specially* appoint an under sheriff or a deputy to execute a part of his office, and reserve the residue of the duties to be discharged by himself. So soon as he appoints an under sheriff or a general deputy, the law clothes the appointee with all the ordinary powers of the sheriff himself. So, any covenant in a deputy's bond, limiting his power to the service of particular process, would be void in respect to such covenant.³ And if the deputy, in violation of such covenant, should make an arrest, he, nevertheless, would be liable for suffering an escape.⁴ But it has been held in Kentucky, that one deputy sheriff may covenant with another deputy of the same sheriff to perform a part of his official duties; and, on failure, he will be liable to an action on the covenant.⁵

3. Jailers.

Custody of Jails.—The sheriff of the city and county of New York has the custody of the jail used in that city for the confinement of persons committed on civil process only, and of the prisoners in the same; and the sheriff of every other city and county of this State shall have the custody of the jails and of the prisons thereof, and the prisoners in the same. And the sheriffs respectively may appoint keepers of such jails and prisons, for whose acts they shall severally be responsible.⁶

¹ Meyer v. Bishop, *supra*.

² Stone v. Chambers, 1 Strobb. (S. C.), 117.

³ Perkins v. Reed, 14 Ala., 536; Montgomery v. Scantland, 2 Yerg. (Tenn.) 337.

⁴ Watson on Sheriffs, 31.

⁵ Dupuy v. Dickerson, Litt. Sel. Cas., 163.

⁶ 1 R. S. (5th ed.), 878, § 170; id. (6th ed.), 907; § 235; 2 id. (7th ed.), 967,

The appointment of these keepers or jailers need not be in writing. Generally the sheriff, if he does not retain the jail in his personal custody, appoints his under sheriff, or one of his deputies, to keep the jail. But the jailer, *as such*, is not an officer; he is merely the servant of the sheriff, and is only answerable to him in *assumpsit* on his implied undertaking to serve him with diligence and fidelity unless the sheriff has taken a bond of indemnity from him, and it would seem that he would not be liable in *tort* to the sheriff, except for a willful escape.¹ The sheriff is answerable civilly for any escape which his jailor may suffer,² but the jailor only could be indicted for suffering the escape voluntarily.³

Deputy Sheriff not Deputy Jailer.—Although the sheriff has custody of the jails, a deputy sheriff, *by virtue of such office*, is not authorized to act as deputy jailer.⁴ An under or assistant jailer, it has been held, is not within the operation of the statute forbidding sheriffs and their deputies from becoming purchasers on sales under executions, for the reason that he can have no official control or agency in the execution of any process directed to the sheriff.⁵ For the same reason jailers themselves, who were not sheriffs, under sheriffs or deputies, may be permitted to become purchasers in such cases.

A jailor has no authority to lease even that part of the jail set apart for his own accommodation;⁶ and a county jailer has no control over a city jail set apart by an act of the legislature and the city ordinances for municipal uses.⁷

Liability of Appointees.—The rules applicable to principal and agent ordinarily apply to the acts of the appointees

§ 75; 3 id. (5th ed.), 725, §§ 12, 13; id. 1061, § 1; id. (6th ed.), 713, §§ 12, 13; 1063, § 1; id. (7th ed.), 2589, § 1; Consol. Act of 1882, § 1715; Code Civ. Pro., §§ 120, 121; *Becker v. Ten Eyck*, 6 Paige, 68; *Stockton v. Shasta*, 11 Cal., 113; *Crossen v. Wasco Co.*, 6 Oreg., 215; *Dabney v. Taliaferro*, 4 Rand. (Va.), 256.

¹ *Kain v. Ostrander*, 8 Johns., 207; *Jones v. Hart*, 2 Salk., 441.

² 1 R. S. (5th ed.), 878, § 170; id. (6th ed.), 907, § 235; 2 id. (7th ed.), 967, § 75.

³ Penal Code, § 115.

⁴ *Skinner v. White*, 9 N. H., 204.

⁵ *Jackson v. Anderson*, 4 Wend., 474.

⁶ *Thompson v. Probert*, 2 Bush. (Ky.), 144.

⁷ *Horsford v. Commonwealth*, 1 Bush (Ky.), 144.

of a sheriff. They, as the sheriff himself, are liable, civilly and criminally, for any violation of the law in the performance of their duties. But an action will not lie against any one of them for a breach of duty in his office, although he may, as well as any other agent, make himself personally responsible by a special undertaking.¹ In such case the sheriff only is liable. And when a deputy sheriff or other agent, is under no legal obligation to a third person in respect to moneys in his hands, a *request* to pay the money cannot create such obligation, or confer a right of action.² But for all *personal torts*, though committed while about the execution of his duties, the deputy is liable.³ And if the act of the deputy be an unofficial act, one beyond the power of the deputy to do, he, alone is liable.⁴

Liability of Under Sheriff in Case of Vacancy.—When a vacancy occurs in the office of sheriff the under sheriff becomes *quasi* sheriff and is liable for mistakes, and punishable for extortion or misfeasance in office as the sheriff is. And when a former sheriff, having unfinished business on his hands, dies after the induction of a new sheriff into office, the former under sheriff becomes substituted in the place of the former sheriff, and assumes all his duties and liabilities in respect to such unfinished business. One of those liabilities is to pay over to a creditor moneys collected on an execution.⁵

Deputy's Liabilities.—Where a deputy sheriff insures goods in his custody in a mutual company, without authority, giving for the premium a note in the name of his principal, the sheriff is not liable upon the note; but as the insurers bear the risk until the sheriff repudiates the note, they may recover against the deputy; his liability rests on the ground that he warrants his authority, and not that the

¹ Paddock v. Cameron, 8 Cow., 211; Colvin v. Holbrook, 2 N. Y., 126; Tuttle v. Love, 7 Johns., 469; Murrel v. Smith, 3 Dana (Ky.), 462; White v. Johnson, 1 Wash. (Va.), 159; but see Draper v. Arnold, 12 Mass., 499; Campbell v. Phelps, 1 Pick. (Mass.), 62; McGruder v. Russel, 2 Blackf. (Ind.), 18; Charles v. Foster, 56 Ga., 612.

² Colvin v. Holbrook, 2 N. Y., 126.

³ Pond v. Leman, 45 Barb., 154; Smith v. Joiner, 1 Chip. (Vt.), 62.

⁴ Dorr v. Mickley, 16 Minn., 20.

⁵ Newman v. Beckwith, 61 N. Y., 205, 213; reversing, S. C., 5 Lans., 80.

contract is to be deemed his own.¹ A deputy sheriff is liable to his principal, for a false return to an execution against the body, by which the latter is damnified, though he knew it to be false; but if the judgment debtor were subsequently surrendered by his bail, and illegally discharged by the sheriff, he cannot recover against the deputy.²

4. *Liability of Sheriff for Acts of His Officers.*

How Liable, Civilly.—It has been long well settled that the sheriff is liable *civiliter* for all the acts of his deputies done in the usual course of their business of deputies, prescribed by law. The deputies are all servants of the sheriff, and in law they are considered but one officer.³ If the act of the deputy is personal only, and does not relate to his duty as an officer, he is not the agent or servant of the sheriff; but if he execute process under color or by virtue of his office, the sheriff is answerable for the consequences. It is not necessary to charge him, that the act of the deputy should in all cases be lawful, or one which he might rightfully do under the process. Where he acts by virtue of his office, third persons have a right to regard him as the mere servant or agent of another, and to resort to the principal for the redress of any injury they may sustain.⁴ So, an action lies against a sheriff for the act of his deputy in taking more fees, on levying an execution, than are allowed by law; and whether the sheriff recognized the act of his deputy, or not, need not be shown.⁵ But a sheriff is not liable for an unofficial act of his deputy. And the fact that the act was done by the deputy in the belief that it was within his official power, and that the

¹ *White v. Madison*, 26 N. Y., 117.

² *Walter v. Middleton*, 68 N. Y., 605.

³ *Allen on Sheriffs*, 81, 86; *Pond v. Leman*, 45 Barb., 152; *King v. Osser*, 4 Duer, 431; *Curtis v. Fay*, 37 Barb., 64; *Norton v. Nye*, 56 Me., 211; *Stimpson v. Pierce*, 42 Vt., 334; *Matthis v. Pollard*, 3 Kelley (Ga.), 1; *Owens v. Gatewood*, 4 Bibb. (Ky.), 494; *Watson v. Todd*, 5 Mass., 271.

⁴ *Walden v. Davidson*, 15 Wend., 575; *James v. Gurley*, 48 N. Y., 163; *People v. Dunning*, 1 Wend., 16; *Cowdery v. Smith*, 50 Vt., 235; *Grinnell v. Phillips*, 1 Mass., 530; *Hazard v. Israel*, 1 Binn. (Penn.), 240; *Dayton v. Lynes*, 30 Conn., 351.

⁵ *McIntyre v. Trumbull*, 7 Johns., 35.

sheriff, on being informed of it approved it, and afterwards acted upon it in the same belief, will not render the latter liable.¹ So, a sheriff is not liable for the acts of his deputies in serving distress warrants.² So, too, a sheriff is not liable for the acts of his deputies, where they act out of the ordinary line of their duty, by the directions of the plaintiff in the execution.³ So acting, the deputy ceases to be the servant of the sheriff and becomes the agent of the party. But in such case it must be shown, in order to discharge the sheriff, not only that the plaintiff directed the deputy to depart from the line of duty imposed by law, but that the deputy followed or undertook to follow his directions.⁴ A sheriff continues liable for the default of his deputy, who has sold perishable goods under an attachment, if the deputy has actually received the price and failed to pay it over, notwithstanding that by direction of plaintiff he made the sale upon credit, instead of for cash. The direction to sell on credit might exonerate him from liability in case the money was not realized, but cannot effect his responsibility for it, after it has been actually received. But to sustain the action, the evidence must show affirmatively that the money was received during the pendency of the attachment suit.⁵ But this subject will be treated more in detail in chapter six, *post*.

5. Bonds of Indemnity.

Sheriff Should Require Bond.—The liability of under sheriffs, general deputies and jailors to the sheriff appointing them is well established at common law, and the sheriff may take from any one of them a bond of indemnity, with satisfactory sureties, conditioned to secure the faithful performance of his duties. Such bond is not illegal as being

¹ *Dorr v. Mickley*, 16 Minn., 20; *Clute v. Goodell*, 2 McLean (U. S.), 193; *Harrington v. Fuller*, 6 Shep. (Me.), 277.

² *Moulton v. Norton*, 5 Barb., 287.

³ *Acker v. Ledyard*, 8 Barb., 514; *Armstrong v. Garrow*, 6 Cow., 464; *Mickles v. Hart*, 1 Denio, 548; *Gorham v. Gale*, 7 Cow., 739; *Fletcher v. Bradley*, 12 Vt., 22; *Corning v. Southland*, 3 Hill, 552; *Samuel v. Commonwealth*, 6 Monr. (Ky.), 173.

⁴ *Sheldon v. Payne*, 7 N. Y., 453.

⁵ *Seaver v. Pierce*, 42 Vt., 325.

taken by color of office.¹ A sheriff should require such bond to be executed and delivered by the one whom he deposes to perform his duties or any part of them, before such deputy does any official act under his appointment; for sureties for the fidelity of a person in an office of limited duration are not liable for past defaults, unless made so in express terms.² When the bond is conditioned to secure the faithful performance of all the duties required of him as such deputy, the condition embraces all the duties which are by law devolved upon the sheriff, which such deputy may perform; and the sureties are liable to the sheriff for acts of the deputy done by color of his office as well as for those done by virtue of his office.³ And duties imposed on such officer by law, different in their nature from those he was required to perform at the time his official bond was executed, do not render it void as an undertaking for the faithful performance of those which he at first assumed. It will still remain a binding obligation for what it was originally given to secure.⁴ The condition of a bond taken by a sheriff to indemnify himself from the acts of his deputy, referring to an actual deputation in general terms, must be construed as an indemnity for so long a time as the obligor was then in fact deputed by the sheriff. So, the liability continues even after the sheriff is out of office, and until all the duties of the deputy relative to process in his hands partially executed have been completely performed. And, in case of the under sheriff, he and his sureties will be liable on his bond to the sheriff, for acts done by him, when performing the duties of the sheriff's office during a vacancy therein. But the liability of the sureties for future acts will be discharged by the sheriff receiving a new bond from

¹ *Willet v. Kip*, 12 Hun, 474; *Colvin v. Holbrook*, 2 N. Y., 126; *State v. Moore*, 19 Mo., 369; *Brayton v. Town*, 12 Iowa, 346; *Stevens v. Colby*, 46 N. H., 163.

² *Andrus v. Waring*, 20 Johns, 153, 165; *Patterson v. Inhabitants, etc.*, of Freehold, 38 N. J. L., 255; *Hetten v. Lane*, 43 Tex., 279; *Thompson v. McGregor*, 81 N. Y., 592; *Stevens v. Boyce*, 9 Johns., 292.

³ *Wood v. Cook*, 31 Ill., 271; *Lucas v. Locke*, 11 W. Va., 81; *Mullen v. Whitmore*, 74 N. C., 477; *Gerber v. Ackley*, 37 Wis., 43; *James v. Yates*, 3 Met. (Ky.), 343.

⁴ *Gansen v. United States*, 97 U. S. (7 Otto.), 584; *Commonwealth v. Holmes*, 25 Gratt. (Va.), 771.

the deputy, though he continue him in office without a new appointment after his resignation.¹ It will not be discharged because the deputy has become unfit to hold his office, or insolvent, of which facts the sureties notify the sheriff and request his removal therefor.² For the stronger reason, mere notice to the sheriff, by the sureties, that they are not willing to continue bound for the deputy's fidelity, will not exonerate them from future liability.³ The sheriff need not discharge the sureties upon the bond unless he chooses so to do. And a plea setting up an agreement by a sheriff that he *would release and discharge the sureties* of a deputy is bad, unless a consideration is alleged.⁴ And the sureties on the bond of a deputy sheriff for the faithful performance of his office are conclusively bound by a judgment obtained against the sheriff for the neglect of the deputy in not paying over money collected on execution, in a suit which the deputy defended.⁵ The failure to pay over money collected on execution, is a breach of the bond, though the sheriff should never be called upon to pay the same.⁶

Liability of Deputy's Bail.—The bail of a deputy sheriff, being considered in the light of *sureties*, are only responsible for his official acts as a general deputy; and he is not accountable to the sheriff in that character, when acting under his *special direction and authority*, in a given case. If there be an exclusion of all discretion on the part of the deputy in the performance of a particular act, because of directions and instructions from the sheriff, that act is not official. But whenever, being sued, the sureties of a deputy interpose the plea that the act for which they are sought to be held accountable, was explicitly directed by the sheriff, it should clearly appear that in giving the direction the sheriff intended to debar the deputy from the exercise of that judgment and discretion in the matter which

¹ Gilbert v. Luce, 11 Barb., 91; Perry v. Campbell, 63 N. C., 257; Williams v. Miller, Kirby (Conn.), 189; Larned v. Allen, 13 Mass., 295; 1 R. S. (5th ed.), 877, § 167.

² Andrus v. Bealls, 9 Cow., 693; Crane v. Newell, 2 Pick. (Mass.), 612.

³ Barnard v. Darling, 11 Wend., 29.

⁴ Barnard v. Darling, *Supra*.

⁵ Chamberlain v. Godfrey, 36 Vt., 380.

⁶ Willet v. Stewart, 43 Barb., 98.

belonged to him as general deputy, and that he so understood it. If the communication was mere information or advice, the better to enable him to discharge his duty, this would not alter his relation to his principal. Notwithstanding such information or advice, he would be expected to act on his own responsibility after ascertaining the true facts in the matter in hand.¹

6. *Removal of Appointees.*

How made.—The under sheriff,² general deputies and jailors hold their respective offices at the pleasure of the sheriff; and any of them may, by him, be removed at any time and others appointed in their stead.³ Although the statute directs that the appointment of an under sheriff or deputy sheriff shall be made under the hand and seal of the sheriff, and be filed in a public office, it makes no provision as to the form to be used in revoking the appointment. But it is very proper that it should be done by some act, in writing, and be notified to the displaced deputy; but the formality of a seal is not indispensable, unless it is required by some positive law, and the statute makes no such requirement. The appointment being during the pleasure of the sheriff, any authentic act indicating his pleasure ought to be sufficient to determine the authority. The common law doctrine that an instrument, under seal, cannot be discharged except by a deed, does not apply. The appointments the sheriff is empowered to make are made by an administrative arrangement, and the statute regulates the same.⁴

7. *Compensation.*

Regulated by Agreement.—There is no law regulating the compensation which a deputy, or any other subordinate of a sheriff, shall receive for performing the duties of the office

¹ Tuttle v. Cook, 15 Wend., 274.

² 1 R. S. (5th ed.), 877, § 166; id. (6th ed.), 906, § 231; 2 id. (7th ed.), 966, § 71.

³ 1 R. S. (5th ed.), 877, § 168; id. (6th ed.), 906, § 233; 2 id. (7th ed.), 966, § 73; Edmunds v. Barton, 31 N. Y., 495; Hoge v. Trigg, 4 Munf. (Va.), 150.

⁴ Edmunds v. Barton, *supra*; 1 R. S. (5th ed.), 877, §§ 168, 169; id. (6th ed.), 906, §§ 233, 234; 2 id. (7th ed.), 966, §§ 73, 74.

unto which he is appointed. Hence the sheriff may agree with such subordinate to pay him a salary, or allow him a portion of the perquisites of the office; and he may take from his deputy a bond, conditioned to account for and pay over a certain portion of the fees of such business as may be done by such deputy by virtue of his appointment. There can be no doubt of the validity of such a bond. Of course, if the sheriff, on appointing a deputy, take an agreement for the payment of a gross sum which is not to come out of the profits of the office, the agreement is void. But where he reserves a part of the fees of the office, or a sum certain, which is to come out of the profits, the contract is good. And the reason why he may take a stipulation for a part of the fees or profits, is because the whole belongs to him; and, as has been said, "it is only reserving a part of his own, and giving away the rest to another."¹ But if a sheriff should, in violation of statute (3 R. S. [7th ed.], 2374, § 59, Penal Code, § 53), on appointing a deputy take a bond or an agreement for the payment of a sum in gross, which was not to come out of the profits of the office, any official act of either, done before a conviction for the offense would be valid.²

SECTION II.

OF THE SHERIFF'S POWERS AND DUTIES GENERALLY.

1. *To Keep an Office.*

It shall be the duty of the sheriff of every county to keep an office in some proper place in the city or village in which the county courts are held, of which he shall file a notice in the office of the clerk of the county. If there be more than one place of holding courts, the notice shall specify in which his office will be kept, or it may specify that an office will be kept in all such places if he thinks proper. Such office shall be kept open every day in the

¹ 1 Becker v. Ten Eyck, 6 Paige, 68; Mott v. Robbins, 1 Hill, 21; Hale v. Gavitt, 18 Ind., 390; Mattoon v. Kid, 7 Mass., 33; Farrar v. Barton, 5 id., 395; Austin v. Moore, 7 Met. (Mass.), 116; Addington v. Saxton, 17 Wis., 327; Pioneer Pr. Co. v. Sanborn, 3 Minn., 413.

² Penal Code, § 55.

year except Sundays, and such other days as are or shall be declared by law to be holidays, in New York and Kings counties, from nine o'clock in the forenoon to four o'clock in the afternoon, and in each of the other counties of this State between the thirty-first day of March and the first day of October, from eight o'clock in the forenoon until six o'clock in the afternoon, and, between the thirtieth day of September and the first day of April, from nine o'clock in the forenoon to five o'clock in the afternoon.¹ Whenever a public holiday shall fall on Sunday, the Monday next following shall be deemed and considered as the first day of the week, and a public holiday.² Every notice or other paper which shall be required to be served on any sheriff, may be served by leaving the same at the office designated by him in such notice, during the hours for which such office is required to be kept open; but if there be any person belonging to such office therein, such notice or paper shall be delivered to such person; and every such service shall be deemed equivalent to a personal service on such sheriff.³ This provision, however, does not include the summons in an action against the sheriff. Such a summons must be served as in the case of other defendants. The statute is to be construed as referring to papers in respect to which it is the sheriff's duty to provide official care and attention, and which are served upon him as sheriff by virtue of his office; not to those which concern him personally.⁴ If no notice shall be filed by any sheriff with the county clerk, as required, the service of all papers on such sheriff may be made by leaving them at the office of the county clerk, with such clerk or his deputy, and the same shall be deemed equivalent to a personal service on such sheriff.⁵

A sheriff's office is a public office, and he is liable if he places in his office a clerk who embezzles money paid to

¹ 3 R. S. (5th ed.), 475, § 43, as amended by Laws of 1860, chap. 276; 476, § 44; 481, § 86; id. (6th ed.), 447, §§ 43, 44, 45; id. (7th ed.), 2374, §§ 54, 55; Consol. Act of 1882, § 1716.

² Laws of 1875, chap. 27, as amended by Laws of 1881, chap. 30; Consol. Act of 1882, § 1716.

³ 3 R. S. (5th ed.), 476, § 45; id. (6th ed.), 447, § 46; id. (7th ed.) 2374, § 56.

⁴ *Sherman v. Conner*, 16 Abb. Pr. (N. S.), 396; S. C., 50 How. Pr., 29.

⁵ 3 R. S. (5th ed.), 476, § 46; id. (6th ed.), 447, § 47; id. (7th ed.), 2374, § 57

him, although he be not the clerk whose duty it is to receive money.¹

2. *Holding Courts.*

No sheriff is authorized to hold any court for any purpose whatever, except to execute writs of inquiry, and such special writs as may be directed to him, pursuant to any statute, and, in the cases provided by law, to inquire into any claim to property seized or levied upon by him.²

Manner of Conducting Trial.—Where it is specially prescribed by law that a sheriff must or may, in his discretion, empanel a jury to try the validity of a claim or title to, or right of, possession of goods or effects, seized by him by virtue of a mandate in an action interposed by a person not a party to the action, the trial must be conducted in the following manner, except as otherwise specially prescribed by law:

1st. The sheriff must, from time to time, notify as many persons to attend as it is necessary, in order to form a jury of twelve persons qualified to serve as trial jurors in the county court of the county, or, in the city and county of New York, in the court of common pleas for that city and county, to try the validity of the claim.

2d. Upon the trial, witnesses may be examined in behalf of the claimant, and of the party at whose instance the property claimed was taken by the sheriff. For the purpose of compelling a witness to attend and testify, the sheriff, upon the application of either party to the inquisition, must issue a subpoena as prescribed in section 854 of the Code of Civil Procedure, and with like effect, except that a warrant to apprehend, or to commit a witness, in a case specified in section 855 or in section 856 of said Code, may be issued by a judge of the court in which the action is brought, or by the county judge, or, in the city and county of New York, by a judge of the court of common pleas for that city and county.

3d. The sheriff or under sheriff must preside upon the trial. A witness, produced by either party, must be sworn by the presiding officer, and examined orally in the pres-

¹ *Abercrombie v. Marshall*, 2 Bay (S. C.), 90; *Carlin v. Kerr*, id., 112.

² 3 R. S. (5th ed.), 476, § 47; id. (6th ed. 447, § 48; id. (7th ed.), 2374, § 58.

ence of the jury. A witness who testifies falsely upon such an examination, is guilty of perjury in a like case, and is punishable in like manner as upon the trial of a civil action.¹

Expenses, How Paid.—Upon such a trial there are no costs: but the fees of the sheriff, jurors, and witnesses must be taxed, by a judge of the court, or the county judge of the county, or, in the city and county of New York, by a judge of the court of common pleas for that city and county, and must be paid as follows:

1. If the jury, by their verdict, find the title, or the right of possession to the property claimed, to be in the claimant; by the party at whose instance the property was taken by the sheriff.

2. If they find adversely to the claimant, with respect to all the property claimed; by the claimant.

3. If they find the title, or the right of possession to only a part of the property claimed, to be in the claimant; each party must pay his own witnesses' fees, and the sheriff's and jurors' fees must be paid, one half by each party to the inquisition.

Before notifying the jurors, the sheriff may, in his discretion, require each of the parties to the controversy to deposit with him such reasonable sum, as may be necessary to cover his legal fees, and the jurors' fees. The sheriff must return to each party, the balance of the sum so deposited by him, after deducting the fees, lawfully chargeable to that party, as prescribed.²

3. *To Provide and Furnish Court Rooms.*

Except where other provision is made therefor by law, the board of supervisors of each county must provide each court of record, appointed to be held therein, with proper and convenient rooms and furniture, together with attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of its business. If the supervisors neglect so to do, the court may order the sheriff to make the requisite provision; and the expense incurred by him in carrying the order into effect, when certified by the court, is a county charge.³

¹ Code Civ. Pro., § 108, as amended by Laws of 1879, chap. 542, § 1.

² Code Civ. Pro., § 109.

³ Code Civ. Pro., § 31.

4. *Custody of Jails.*

The building, now used as a jail in the city of New York, for the confinement of prisoners in civil causes, shall continue to be the jail of the city and county of New York, for the confinement of such persons ; and the sheriff of the city and county of New York shall have the custody thereof, and of the prisoners in the same.¹

The buildings, now used as the jails of other counties of the State, shall continue to be the jails of those counties respectively until other buildings have been designated or erected for that purpose, according to law ; and the sheriff of each county shall have the custody of the jail or jails of his county, and of the prisoners in the same.²

The sheriff of the county, in which there is more than one jail, may confine a prisoner in either ; and may remove him from one jail to another, within the county, whenever he deems it necessary for his safe keeping, or for his appearance at court.³

Temporary Jails.—If there is no jail in a county ; or the jail becomes unfit or unsafe for the confinement of some or all of the prisoners ; or is destroyed by fire, or otherwise ; or if a pestilential disease breaks out in the jail, or in the vicinity of the jail, and the physician to the jail certifies that it is likely to endanger the health of any or all of the prisoners in the jail ; the county judge, or, in the city and county of New York, the chief-judge of the court of common pleas, must, by an instrument in writing, filed with the clerk of the county, designate another suitable place within the county, or the jail of a contiguous county, for the confinement of some or all of the prisoners, as the case requires. The place so designated thereupon becomes, to all intents and purposes, except as otherwise prescribed in this article, the jail of the county for which it has been so designated, and for the purposes expressed in the instrument designating the same.⁴

The designation may be modified or revoked, by the

¹ Code Civ. Pro., § 120.

³ Code Civ. Pro., § 122.

² Code Civ. Pro., § 121.

⁴ Code Civ. Pro., § 135.

judge making the same, by a like instrument in writing, filed with the clerk of the county.¹

The county clerk must serve a copy of the designation, duly certified by him, under his official seal, on the sheriff and keeper of the jail of a contiguous county so designated. The sheriff of that county must, upon the delivery of the sheriff of the county for which the designation is made, receive into his jail, and there safely keep, all persons who may be lawfully confined therein, pursuant to the above provisions; and he is responsible for their safe keeping, as if he was the sheriff of the county for which the designation is made.²

When a jail is erected for the county, for whose use the designation was made, or its jail is rendered fit and safe for the confinement of prisoners, or the reason for the designation of another jail or place has otherwise ceased to be operative, the designation must be revoked.³

The county clerk must immediately serve a copy of the revocation, duly certified by him under his official seal, upon the sheriff of the same county; who must remove the prisoners belonging to his custody, and confined without his county, to his proper jail. If a prisoner has been admitted to the jail liberties in the other county, he must also be removed; and he is entitled to the liberties of the jail of the county, to which he is removed, without a new bond, as if he had been originally admitted to the jail liberties in that county; and the bond given by him applies accordingly to those liberties.⁴

If by reason of a jail, or a building near a jail, being on fire, there is reason to apprehend that some or all of the prisoners confined in the jail, may be injured, or may escape, the sheriff or keeper of the jail may, in his discretion, remove them to some safe and convenient place, and there confine them until they can be safely returned to the jail; or, if the jail is destroyed, or so injured that it is unfit or unsafe for the confinement of the prisoners, until a designa-

¹ Code Civ. Pro., § 136.

² Code Civ. Pro., § 137.

³ Code Civ. Pro., §§ 141, 136.

⁴ Code Civ. Pro., § 142.

tion is made, as prescribed in section 135 of the Code of Civil Procedure.¹

If the county judge, or the chief judge of the court of common pleas for the city and county of New York, is absent or unable to act, or if his office is vacant, a designation, or the revocation or modification thereof, as prescribed, may be made in any county except New York, by the special county judge or the district attorney, or, in the city and county of New York, by any judge of the court of common pleas.²

Jail in Kings County.—A suitable portion of the jail of Kings county, must be assigned by the board of supervisors of said county, for the confining of such prisoners as the sheriff of that county may legally hold by virtue of civil process, and the sheriff shall have exclusive custody of the portion so assigned.³

Jail of Onondaga County.—The penitentiary of Onondaga county shall be used for all the purposes of a jail for said county, and the superintendent shall be the jailer, and have the custody and control of all persons confined therein, as the sheriff of said county, were the law relative to said penitentiary not passed. All general laws now in force regulating the jails of the respective counties of this State, shall, so far as they are consistent with said act, be applicable to the penitentiary in its use as a county jail. If the superintendent shall neglect or refuse to give and file the bond required of him, he shall forfeit the office; and in case of a vacancy in the office of superintendent, the said sheriff shall have the immediate custody and control of said penitentiary, and the prisoners therein, until another superintendent shall have been appointed and given the bond required.⁴

Jail of Albany County.—Following is the text of an act relating to the jail in Albany county: SECTION 1. The sheriff of Albany county is hereby authorized and directed to remove the prisoners from the building at present used and occupied as the Albany county jail, to the Albany county penitentiary, and the said pen-

¹ Code Civ. Pro., § 143.

² Code Civ. Pro., § 144.

³ Crock. on Sheriffs, 100, § 210.

⁴ Laws of 1851, chap. 32.

penitentiary is hereby designated as the county jail of Albany county. And the superintendent of said penitentiary, appointed by the joint board of supervisors of said county and the mayor and recorder of the city of Albany, shall be the jailer thereof, and have the custody and control of all persons confined therein, as the sheriff of said county would have were this law not enacted, and no jailer shall hereafter be appointed by the sheriff of Albany county.

§ 2. The superintendent of said penitentiary shall, within ten days after this act takes effect, and within ten days after any new appointment shall be made, give a bond to the sheriff of Albany county, in the sum of fifteen thousand dollars, which shall be annually renewed on and after the first day of January in each year, to be approved by the sheriff and county judge, with at least three sureties, who shall be free freeholders and inhabitants of said county, who shall justify in the sum of five thousand dollars each, at least; or, if more than three sureties, in a sum sufficient each, to amount in the whole to the sum of fifteen thousand dollars, conditioned that he will faithfully discharge the duties of jailer of said county, and save the sheriff harmless from, and on account of, any and all escapes that shall happen from said jail, of which he is superintendent, and that he will immediately pay over all moneys that may be in his hands belonging to said sheriff; and that he will faithfully perform all acts, and save the said sheriff harmless from all acts that he shall perform by virtue of or under color of his office as jailer of said county of Albany; and if he shall refuse or neglect to give such bond he shall forfeit his office, and the sheriff shall have the immediate custody and control of said penitentiary and jail, and the prisoners confined therein, until another superintendent shall have been appointed and given the bond as aforesaid.

§ 3. It shall be the duty of said superintendent, as such jailer, to convey prisoners to and from said jail, as their presence and attendance may be required or ordered, or directed by the sheriff of Albany county. The sheriff of said county shall receive no compensation for the transportation of prisoners to and from said jail.

§ 4. The superintendent of said penitentiary shall pre-

pare and keep, for the purpose of said jail, separate rooms or apartments for juvenile prisoners, for females, for persons detained as witnesses, and for imprisoned debtors, each and all of said classes of persons to be kept separate and apart from each other, and from those committed to said jail as criminals, who are adult males. And, after this act takes effect, the building at present used as a jail shall no longer be used for such purpose.

§ 5. All general laws now in force, regulating the jails of the respective counties of the State, and all laws in reference to the jail of Albany county shall, so far as they are consistent with this act, be applicable to said jail. Nothing in this act contained to interfere with the penitentiary as now used, or the laws regulating the same, except that persons temporarily committed to the same as a jail, but not under sentence of conviction for the commission of any crime, shall not be confined in the same apartments with those committed to said penitentiary as convicts. The expenses of transporting and maintaining persons committed to said jail as aforesaid, shall be paid out of the penitentiary fund, and accounted for as other expenses of the penitentiary are accounted for.

§ 6. The superintendent of the penitentiary is hereby authorized and empowered to make such additions and alterations in the penitentiary as may be necessary to fit it for the uses and purposes herein designated. But the expense thereof shall not exceed the sum of three thousand dollars.¹

Jail, how used.—The common jails in the several counties of this State shall be used as prisons: 1. For the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal case. 2. For the detention of persons charged with crime, and committed for trial. 3. For the confinement of persons duly committed for any contempt, or upon civil process; and, 4. For the confinement of persons sentenced to imprisonment therein upon conviction for any offense.²

Number of Rooms.—Each county prison shall contain:

¹ Laws of 1882, chap. 251.

² 3 R. S. (5th ed.), 1061, § 1; id. (6th ed.), 1063, § 1; id. (7th ed.), 2589, § 1.

1. A sufficient number of rooms for the confinement of persons committed on criminal process, and detained for trial, separately and distinct from prisoners under sentence. 2. A sufficient number of rooms for the confinement of prisoners under sentence. 3. A sufficient number of rooms for the separate confinement of persons committed on civil process for contempt or as witnesses.¹

Liquors Prohibited.—Strong, spirituous, or fermented liquor, or wine, shall not, on any pretense, be sold within a building used and established as a jail. Spirituous, fermented or other liquor, except cider, and that quality of beer called table-beer, shall not be brought into a jail for the use of a person confined therein, without a written permit by the physician to the jail, which must be delivered to and kept by the keeper thereof, specifying the quantity and kind of liquor which may be furnished, the name of the prisoner for whom, and the time during which the same may be furnished.²

Such a permit shall not be granted, unless the physician is satisfied, that the liquor allowed to be furnished is necessary for the health of the prisoner, for whose use it is permitted; and that fact must be stated in the permit.³

A person who brings into or sells in a jail, strong, spirituous, fermented, or other liquor, or wine, contrary to the foregoing provisions of this article; or a sheriff, keeper of a jail, assistant keeper, or an officer, or person employed in or about the jail, who knowingly suffers liquor or wine to be sold or used therein, contrary to this article, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.⁴

To Provide Bibles.—It shall be the duty of the keeper of each county prison to provide a Bible for each room in the prison, to be kept therein, and he shall, if practicable, cause divine service to be performed for the benefit of the prisoners, at least once each Sunday; provided there shall be a room in the prison that can be safely used for that purpose.⁵

¹ 3 R. S. (5th ed.), 1061, § 2; id. (6th ed.), 1063, § 2; id. (7th ed.), 2589, § 2.

² Code Civ. Pro., § 128.

³ Code Civ. Pro., § 129.

⁴ Code Civ. Pro., § 130.

⁵ 3 R. S. (5th ed.), 1063, § 13; id. (6th ed.), 1064, § 13; id. (7th ed.), 2590, § 13.

To Admit Inspectors.—The sheriff or other keeper of a jail must admit the inspectors of State prisons, or any one of them, into every part thereof; exhibit to them on demand, all the books, papers, documents and accounts pertaining to such jail or prison, or to the detention of persons confined therein; and render to them every other facility in their power to enable them to discharge their duties and to obtain any necessary information; and the said inspectors may examine on oath, to be administered by any one of them, any of the keepers or officers of such jail and any person, not under sentence, confined therein, and converse with any of the prisoners so confined, without the presence of the keepers thereof, or of any of them.¹ And the governor and lieutenant governor, secretary of state, comptroller and attorney-general, members of the legislature, judges of the Court of Appeals, Supreme Court and county judges, district attorneys, grand jurors and every minister of the gospel having charge of a congregation in the town wherein any such prison is situated, may visit at pleasure all county and State prisons. No other person, not otherwise authorized by law, shall be permitted to enter the rooms of a county prison in which convicts are confined, unless under such regulations as the sheriff of the county shall prescribe.²

To Return List of Disorderly Persons.—The keeper of every prison to which disorderly persons may be committed, must return to the court of sessions of the county, on the first day of each term, a list of the persons so committed and then in his custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.³

Guard to Protect Jail.—On the application of the sheriff, under sheriff or district attorney of any county of this State, with the assent of the county judge of such county, the governor may, if in his opinion it shall be necessary and proper, authorize such sheriff or officer, or some deputy sheriff, to contract with and organize a guard for the protection of any jail or prison in said county, or to arrest, de-

¹ 3, R. S. (5th ed.), 1064, § 20; id. (6th ed.), 1065, § 20; id. (7th ed.), 2591, § 20.

² 3 R. S. (5th ed.), 1101, § 182; Code Crim. Pro., § 261.

³ Code Crim. Pro., § 908.

tain or have in safe keeping any prisoner or prisoners, or to enforce any process, judgment or decree of any court; which application and authority shall be in writing, and a copy thereof filed and recorded in the office of the secretary of state;¹ and the authority shall specify the number of persons beyond which the said guard shall not extend.²

The governor may, at any time, revoke, alter or modify such authority;³ and he may, in his discretion, permit such authorized officer to contract with any uniform company or companies to form such guard;⁴ and, when so formed, the guard shall be under the command and direction of such officer or officers as shall be designated by the governor; and in case he shall not make such designation, then, under the command of the sheriff, under sheriff or deputy, and of such officer or officers, military or civil, as shall be designated by such sheriff or deputy, and shall be subject to all such rules and regulations for their government and action as shall have been agreed upon at the time of their organization, or afterwards directed by the governor.⁵

Whenever the sheriff of any county shall deem it necessary to raise a temporary guard for the protection of a jail or prison, or the safe keeping of prisoners, he may, with the assent of one of the judges of the county courts, employ such temporary guard as may be necessary, until a guard can, with reasonable diligence, be formed and organized as above prescribed, the expenses of which said temporary guard, and the expenses of the sheriff or other county officer incurred in obtaining such guard, shall be audited, allowed and paid by the board of supervisors of said county as other county charges.⁶

Service of Papers on Prisoners.—A sheriff or jailer, upon whom a paper in an action or special proceeding, directed to a prisoner in his custody, is lawfully served, or to

¹ 3 R. S. (5th ed.), 729, § 33; id. (6th ed.), 716, § 33; 1 id. (7th ed.), 792, § 2; Laws of 1845, chap. 69, § 2.

² 3 R. S. (5th ed.), 729, § 34; id. (6th ed.), 716, § 34; 1 id. (7th ed.), 792, § 3; Laws 1845, chap. 69, § 3.

³ 3 R. S. (5th ed.), 729, § 35; id. (6th ed.), 716, § 35; 1 id. (7th ed.), 792, § 4.

⁴ 3 R. S. (5th ed.), 729, § 36; id. (6th ed.), 716, § 36; 1 id. (7th ed.), 792, § 5.

⁵ 3 R. S. (5th ed.) 729, § 37; id. (6th ed.), 716, § 37; 1 id. (7th ed.), 792, § 6.

⁶ 3 R. S. (5th ed.), 730, §§ 46, 47; id. (6th ed.), 717, §§ 47, 46; 1 id. (7th ed.), 793, §§ 15, 16.

whom such a paper is delivered for a prisoner, must, within two days thereafter, deliver the same to the prisoner, with a note thereon of the time of the service thereof upon or the receipt thereof by him. For a neglect or violation of this section, the sheriff or jailer, guilty thereof, is liable to the prisoner for all damages occasioned thereby.¹

Subject to reasonable regulations, which the sheriff may establish for that purpose, a sheriff, jailer or other officer, who has the custody of a prisoner, must permit such access to him as is necessary, for the personal service of a paper in an action or special proceeding, to which the prisoner is a party, and which must be personally served.²

5. *To Insure Buildings.*

The sheriff may insure at the expense, and for the benefit of the county, any of the county buildings of which, by law, he has the care and custody.³

To Carry into Effect Plans, etc.—When the board of State prison inspectors shall furnish to the sheriff or other keeper of the jail of any county, plans and regulations, duly made, for the modification and improvement of the structure of such jail, such sheriff or other keeper must observe and carry the same into effect.⁴

Calendar for Courts.—It shall be the duty of the keeper of every county prison to present to every court of oyer and terminer, and to every court of sessions to be held in his county, at the opening of such court, a calendar, stating: 1. The name of every person then detained in such prison. 2. The time when such prisoner was committed, and by virtue of what process or precept; and 3. The causes of the detention of every such person.⁵

6. *As Peace Officers Without Warrant.*

Sheriff a Peace Officer.—A peace officer is a sheriff of a county, his under sheriff or his deputy, or a constable, marshal, police constable, or policeman of a city, town or vil-

¹ Code Civ. Pro., § 131.

² Code Civ. Pro., § 132.

³ 1 R. S. (5th ed.), 858, § 54.

⁴ 3 R. S. (5th ed.), 1064, § 19; id. (6th ed.), 1065, § 19; id. (7th ed.), 2591, § 19.

⁵ 3 R. S. (5th and 6th ed.), 1066, § 25; id. (7th ed.), 2593, § 25.

lage.¹ Their powers and duties *as peace officers without warrant* are the same. A peace officer may, without a warrant, arrest a person: 1. For a crime committed, or attempted, in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has, in fact, been committed, and he has reasonable cause for believing the person to be arrested to have committed it.² To make an arrest, as provided above, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.³ He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony had been committed, but that the person arrested did not commit it.⁴ When arresting a person without a warrant the officer must inform him of his authority and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.⁵ A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a by-stander and delivered to him.⁶ But he is not bound to arrest and detain a man as a felon, merely on the information of a citizen.⁷ And he should not receive every rumor, but should make such diligent inquiry concerning the truth thereof as he can under the circumstances, before he assumes to make an arrest on information of felony. When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command

¹ Code Crim. Pro., § 154, as amended in 1882; *Doughty v. State*, 33 Tex., 1; *Williams v. State*, 44 Ala., 41; *Kindred v. Stitt*, 51 Ill., 401; *Drennan v. People*, 10 Mich., 169.

² Code Crim. Pro., § 177; *Quinn v. Heisel*, 40 Mich., 376; *Johnson v. State*, 5 Tex. App., 43; *Shanley v. Wells*, 71 Ill., 78; *Burns v. Erben*, 40 N. Y., 463. *Sternack v. Brooks*, 7 Daly, 142; *Brooks v. Commonwealth*, 61 Penn. St., 352.

³ Code Crim. Pro., § 178; *Commonwealth v. Reynolds*, 120 Mass., 190.

⁴ Code Crim. Pro., § 176; *Holley v. Mix*, 3 Wend., 350; *Allen v. Leonard*, 28 Iowa, 529.

⁵ Code Crim. Pro., § 180; *Bellows v. Shannon*, 2 Hill, 86; *State v. Bells*, 76 N. C., 10; *Wolf v. State*, 19 Ohio St., 248.

⁶ Code Crim. Pro., § 181.

⁷ *Wark's Case*, 5 C. H. Rec., 4.

any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.¹ But he cannot command, and the person commanded cannot make, such an arrest after the defendant is beyond the jurisdiction of the magistrate, if the offense committed is less than felony.² And it has been held that a magistrate may not arrest for an affray on his own view, after it is over.³ But the arrest without process of a person guilty of felonious homicide is lawful under the laws of this State whenever or wherever made; and this seems to be so at common law.⁴ For a felony the arrest may be made at any time, and the offender may be pursued into another county.⁵

Breach of the Peace.—The word “crime” includes a breach of the peace: for a crime is defined as an act or omission forbidden by law, and punishable on conviction by—1, death; or, 2, imprisonment; or, 3, fine; or, 4, removal from office; or, 5, disqualification to hold any office of trust, honor or profit under the State; or, 6, other penal discipline.⁶ Now the power with which a peace officer is invested regarding a breach of the peace, is not only to put an end to the breach, but to make an arrest as the means of procuring surety of the offender to keep the peace. To do this he is allowed a reasonable time and a fit opportunity.⁷ And in the case of an affray in the presence of a peace officer in which a number of persons are implicated, he would be incapable of arresting them if they resisted; and if he could not delay arresting until he can procure help, punishment would be impossible. What is a reasonable time is, upon undisputed fact, for the court to determine upon the facts of the particular case. It has been held in one case

¹ Code Crim. Pro., § 182; *Lindsay v. People*, 67 Barb., 548.

² *Butolph v. Blust*, 5 Lans., 85; S. C., 41 How. Pr., 481.

³ 5 C. H. Rec., 95.

⁴ *Balbo v. People*, 19 Hun, 424, 429.

⁵ *Butolph v. Blust*, 5 Lans., 84; *Holley v. Mix*, 3 Wend., 350; *Tanderveer v. Mattocks*, 3 Ind., 479; *Main v. McCarty*, 15 Ill., 441; *Wrexford v. Smith*, 2 Root (Conn.), 171.

⁶ Penal Code, § 3; for common law definition see 1 Bouv. Law. Dict., 410.

⁷ *Taylor v. Strong*, 3 Wend., 384; *Butolph v. Blust*, 5 Lans., 84; *Derecourt v. Corbishley*, 85 E. C. L., 187.

that a half hour's delay was not unreasonable.¹ In another, a case of an arrest for resisting the officer in making an arrest, a delay of two hours after the arrest made the resistance unlawful.² Generally, though, if opportunity is afforded to the officer to obtain a warrant from the proper magistrate, he should do so. But if one is threatened with death, and complaint is forthwith made to an officer, he may and he should, to prevent probable felony, arrest and detain the person charged until he can conveniently bring him before a magistrate.³ He preserves the peace by preventing crime as well as by punishing for it.

Force Used.—The amount of force which a peace officer may lawfully use in making an arrest, is so much as is necessary to effect the arrest and no more. If he uses more force than the occasion calls for he is guilty of an assault and battery.⁴

The peace officer should remember that he has no authority to arrest, without warrant, for a crime less than felony, unless the offense is committed or attempted in his presence. A felony is a crime which is, or may be, punishable by either—1, death; or, 2, imprisonment in a State prison.⁵ Hence, he is not authorized, without warrant, to arrest a person as a common prostitute, on the ground that she is a disorderly person, unless the offense was committed in his presence.⁶ If the prostitute is sitting at a window, in the act of soliciting men from the street for immoral purposes, she may be arrested without warrant; the offense against society is being committed.⁷ And he may not arrest, without warrant, for the offense of selling intoxicating liquors, after the offense has been committed.⁸

Whether a sheriff arrests a person under a warrant, or without warrant, under the authority given him by statute,

¹ *Butolph v. Blust*, 5 Lans., 84; and see *Taylor v. Strong*, 3 Wend., 384.

² *Regina v. Walker*, 25 Eng. Law and Eq., 589.

³ *Russ. on Crimes*, 600, 2 Hale's Crim. Law, 88.

⁴ *Golden v. State*, 1 S. C., 292; *Beaverts v. State*, 4 Tex. App., 175.

⁵ Penal Code, § 5.

⁶ *People ex rel. Kingsley v. Pratt*, 22 Hun, 300; *People v. Bush*, 1 Wh. Cr. Cas., 137; and see *Schneider v. McLane*, 3 Keyes, 568; S. C., 4 Abb. Dec., 154; 36 Barb., 495.

⁷ *Harft v. McDonald*, 1 City Ct., 181.

⁸ *Meyer v. Clark*, 41 N. Y. Super. Ct., 105.

he acts in his official capacity. His duty to arrest, where a case specified in the statute is sufficiently brought to his knowledge, is as imperative as when a warrant is in his hands; and for making such arrest he is entitled to the same compensation as for making an arrest under a warrant, but he is not entitled to any reward for such arrest.¹

Retaking after an Escape or Rescue.—If a person arrested escape or be rescued, the person from whose custody he escaped, or was rescued, may immediately pursue and retake him; at any time, and at any place in the State.²

To do this, the person may, after notice of his intention, and refusal of admittance, break open an outer or an inner door or window of a building.³

Duty of Peace Officers Generally.—It is the duty of a peace officer ever to be upon the watch against crime. To him is given the power to arrest, without warrant, of his own motion, any person doing an act, or attempting to do an act, for the doing of which the laws have declared a punishment of any kind, whether light or severe.⁴ If a crime punishable by death, or by imprisonment in a State prison, has been committed, though not in his presence, he may, without warrant, arrest the person committing the same; nor does his power cease here. If a felony is committed, and he has reasonable cause to believe a certain person committed it, he may arrest that person without warrant, although, in fact, he was not the transgressor.⁵ In some cases, where the statutes declare an act to be a crime, they have also prescribed the duties of peace officers with reference to the act.⁶ To those cases we will call the attention of the sheriff particularly. But whether or not the statute declaring an act a punishable one, also declares the duty of a peace officer with reference to it, the duty continues with the officer as a conservator of the peace, to prevent, if he can, the commission of the crime, and to arrest the de-

¹ *Coyles v. Hurin*, 10 Johns., 85; *Warner v. Grace*, 14 Minn., 487.

² Code Crim. Pro., § 186.

³ Code Crim. Pro., § 187.

⁴ Code Crim. Pro., § 177; Penal Code, § 3.

⁵ Code Crim. Pro., § 177, Penal Code, § 5.

⁶ *E. g.*, Code Crim. Pro., §§ 890–893, with reference to vagrancy; Penal Code, §§ 336–352, with reference to gaming.

fendant who commits a misdemeanor in his presence ; and, if a felony has been committed, whether in his presence or not, to arrest the party committing it, or the one whom he has reason to believe committed it. The Penal Code defines crime, and declares in unmistakable terms what crimes are felonies and what misdemeanor.¹ It is enough here to call the attention of the sheriff to the fact that, for the doing of any act in his presence, which the law declares to be punishable, he has the power, and it is his duty, without warrant, to arrest the offender. If the act be punishable by death, or by imprisonment in a State prison, he has the power, and it is his duty, to arrest the offender, without warrant, wherever he may be found within the State, though the act was not committed in his presence.

Disturbance of Religious Meeting.—In the Revised Statutes it is particularly enjoined upon peace officers, present at any religious meeting, to arrest any one disturbing the same in a manner prohibited by the statute.² The Penal Code declares the offense a misdemeanor, and although it does not specifically declare the duties of the peace officer present at a religious meeting disturbed in a prohibited manner, nevertheless the duty continues as declared by the Revised Statutes. The Penal Code, with reference to the disturbance of religious meetings, has enacted the following: “A person who willfully disturbs, interrupts or disquiets any assemblage of people met for religious worship, by any of the acts enumerated in the next section is guilty of a misdemeanor.”³ “The following acts, or any of them, constitute disturbance of a religious meeting: 1. Uttering any profane discourse, committing any rude or indecent act, or making any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting. 2. Engaging in or promoting, within two miles of the place where a religious meeting is held, any racing of animals or gaming of any description. 3. Obstructing in any manner,

¹ Penal Code, §§ 3, 5, and 6.

² 2 R. S. (5th ed.), 934, §§ 58, 60, 61; 2 id. (6th ed.), 927, §§ 76-82; 3 id. (7th ed.), 1973, §§ 64-68.

³ Penal Code, § 274.

without authority of law, within the like distance, free passage along a highway to the place of such meeting.”¹

It has been held that the offense of disturbing a religious meeting may be committed before or after actual service, while any of the congregation remain upon the premises.² To the zealous peace officer, then, it might seem that the young men ordinarily about a church door at the conclusion of evening service, waiting to “catch on” were guilty of a misdemeanor in obstructing the free passage along the highway. This matter, however, has never been before the courts for adjudication. The officer should see to it that the “boys” spend their moments of eager waiting in a line *along* the highway, and not *in* it; if any one of them willfully persists in standing in the way, the officer should at once arrest him. Bad singing is not within the prohibition of the statute, although it tends to, and does, disturb and disquiet the assemblage, unless it is willfully engaged in for the purpose of disturbing the meeting. So long as a person conscientiously takes part in the worship, he must be let alone, no matter how badly he sings.³

Mere mischievous or heedless conduct is not willful within the meaning of the Code.⁴ But if such conduct is persisted in when the offender knows or should know he is disturbing the assemblage, or any part of it, a peace officer present should take him in charge. Willful conduct which embarrasses or disturbs the minister or curate in the conduct of the service, as making faces at him or imitating his gestures, is a disturbance of the meeting.⁵ But an official may, pursuant to a resolution, notify the minister that he must not continue the service.⁶ Groaning aloud and giggling during a prayer, has been held to be a disturbance within the statute.⁷ So, too, the cracking and eating of nuts, during religious services, may constitute a punishable disturbance

¹ Penal Code, § 275.

² Dawson v. State, 7 Tex. App., 59; State v. Lusk, 68 Ind., 264; State v. Ramsay, 78 N. C., 448; Lancaster v. State, 53 Ala., 398; Wall v. Lee, 34 N. Y., 141, 150

³ State v. Linkhaw, 69 N. C., 215.

⁴ Brown v. State, 46 Ala., 175.

⁵ People v. Crowley, 23 Hun, 412.

⁶ Richardson v. State, 5 Tex. App., 470.

⁷ Friedlander v. State, 7 Tex. App., 204.

of worship.¹ To constitute the offense, it is not necessary that the attention of the entire body of worshipers is called to the improper conduct. It suffices, if any considerable part of the assemblage are disturbed.² An ordinary Sunday-school, where the Bible and religious precepts are taught, is an assemblage of people met for religious worship within the meaning of the Penal Code.³ But a body of persons who assume to meet in a public street, or on a portion of a public square in a city, is not such an assemblage.⁴

Vagrants.—The following persons are vagrants: 1. A person who, not having visible means to maintain himself, lives without employment. 2. A person who, being an habitual drunkard, abandons, neglects or refuses to aid in the support of his family. 3. A person who has contracted an infectious or other disease, in the practice of drunkenness or debauchery, requiring charitable aid to restore him to health. 4. A common prostitute, who has no lawful employment, whereby to maintain herself. 5. A person wandering abroad and begging, or who goes about from door to door, or places himself in the streets, highways, passages, or other public places, to beg or receive alms. 6. A person wandering abroad, and lodging in taverns, groceries, ale-houses, watch or station-houses, out-houses, market-places, sheds, stables, barns or uninhabited buildings, or in the open air, and not giving a good account of himself. 7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure. 8. Any child between the age of five and fourteen, having sufficient bodily health and mental capacity to attend the public schools found wandering in the streets or lanes of any city or incorporated village, a truant, without any lawful occupation.⁵ To authorize the arrest of one, as a vagrant, by a peace officer without warrant, it must appear that the person arrested comes clearly within the description of one of the classes

¹ Hunt v. State, 3 Tex. App., 412.

² Holt v. State, 57 Tenn., 192.

³ Martin v. State, 6 Baxter (Tenn.), 234.

⁴ State v. Schieneman, 64 Mo., 386.

⁵ Code Crim. Pro., § 887; see Ga. Code, § 4560; Ala. Rev. Code, § 3630.

denominated vagrants; *e. g.*, a common prostitute cannot be arrested as a vagrant, unless she have no lawful employment whereby to maintain herself.¹ An incorrigible son, who stays away from home in disobedience to parental commands, cannot be committed as a vagrant.²

The statute does not necessarily require proof of spoken words to constitute begging. One who, in the public streets, attracts attention to his diseased or crippled condition, and holds out his hands for and receives money in charity is a vagrant.³

A peace officer must, when required by any person, take a vagrant before a justice of the peace or police justice of the same city, village or town, or before the mayor, recorder or city judge, or judge of the general sessions of the same city, for the purpose of examination. If the magistrate be satisfied, from the confession of the person so brought before him, or by competent testimony, that he is a vagrant, he must convict him, and must make and sign, with his name of office, a certificate as prescribed by section 891 of the Code of Criminal Procedure, and immediately cause the certificate which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must by a warrant, signed by him with his name of office, commit the vagrant, if not a notorious offender, and a proper object for such relief, to the county poor-house, if there be one, or to the alms-house or poor-house of the city, village or town, for six months at hard labor; or, if the vagrant be an improper person to be so committed, he must be committed for a like term to the county jail; or, in the city of New York, to the city prison or penitentiary of that city.⁴ If a child be found begging for alms, or soliciting charity from door to door, or in a street, highway or public place in a city, village or town, a justice of the peace or police justice, on complaint and proof thereof, must com-

¹ Forbes' Case, 11 Abb. Pr., 52; S. C., 19 How. Pr., 457; 4 Park. Cr., 611; Gray's Case, 11 Abb. Pr., 56; S. C., 4 Park. Cr., 616; Walters v. State, 52 Ga., 574; Matter of Travis, 55 How. Pr., 347; and see Shanley v. Wells, 71 Ill., 78; State v. Custer, 65 N. C., 339.

² Matter of Conroy, 54 How. Pr., 432.

³ Matter of Haller, 3 Abb. N. C., 65.

⁴ Code Crim. Pro., §§ 890, 891, 892.

mit the child to the county poor-house or other place provided for the support of the poor, to be kept, employed and instructed in useful labor until discharged by the county superintendents of the poor, or, in the city of New York, by the commissioners of charities and corrections, or bound out as apprentices by them, as prescribed by special statutes.¹

It is the duty of every peace officer of the county, city, village or town, where a person, described in the seventh subdivision of section 887 of the Code of Criminal Procedure (*ante*, p. 45), to arrest and take him before a magistrate to be proceeded against as a vagrant.² And in the execution of this duty the peace officer may command the aid of as many male inhabitants of his county, city, village or town, as he may think proper, and a citizen so commanded may provide himself, or be provided, with such means and weapons as the officer giving the command may designate.³ A person so commanded to aid the officer, and who, without lawful cause, refuses or neglects to do so, is guilty of a misdemeanor, and is punishable by a fine not exceeding \$250, or by imprisonment not exceeding one year, or both.⁴

Gaming.

Keeping Gambling Apparatus.—It is unlawful to keep or use any tables, cards, dice, or any other article or apparatus whatever, commonly used or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at any of the following places: 1. Within a building, or the appurtenances or grounds connected with any building, in which a court of justice usually holds its sessions; or a building, any part of which is usually occupied by a religious corporation, or an incorporated benevolent, charitable, scientific or missionary society, or an incorporated academy, high school, college or other institution of learning, a library company, or building and mutual loan company. 2. Within any building, or the appurtenances or grounds connected with any building, while votes are received or canvassed therein at

¹ Code Crim. Pro., § 893.

³ Code Crim. Pro., § 896.

² Code Crim. Pro., § 894.

⁴ Code Crim. Pro., § 897.

any election for an officer of this State, or of the United States, or while any public meeting is held therein. 3. Within the distance of one mile from the grounds upon which any training, review, drill or exercise of a military organization, created or permitted by the laws of this State, is proceeding, or upon which any public fair, exhibition, exercise or meeting is held in the open air; or, 4. Within any vessel lying in, or navigating, any of the waters of this State; or owned, or navigated by, or for account of any corporation created by the laws of this State.¹ A person who knowingly violates § 336 of the Penal Code (the statute just given), is guilty of a misdemeanor.² And an article or apparatus maintained or kept in violation of its provisions is a public nuisance.³

Winning and Exacting Money at Play.—A person who, by any fraud, or false pretense whatsoever, while playing at any game, or while having a share in any wager played for, or while betting on the sides or hands of such as play, wins or acquires to himself, or to any other, a sum of money or other valuable thing, is guilty of a misdemeanor.⁴ A person who exacts or receives from another, directly or indirectly, any money or other valuable thing, by reason of the same having been won by playing at cards, faro, or any other game of chance, or any bet or wager, whatever, upon the hands or sides of players, forfeits five times the value of the money or thing so exacted or received, to be recovered in a civil action by persons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.⁵ A person who wins or loses at play or by betting, at any time, the sum or value of \$25 or upwards, within the space of twenty-four hours, is punishable by a fine not less than five times the value of the sum so lost or won, to be recovered in a civil action by the per-

¹ Penal Code, § 336; see Va. Code 1873, chap. 194, § 1; Ala. Code, § 4207; Cal Penal Code, § 330; Tex. Pen. Code, art. 358; Gantt's Ark. Dig., §§ 1557, 1560; Ga. Code, § 4540; 2 Ind. Rev. Stat., 1876, p. 442, § 38; p. 469, § 29, and p. 480, § 74; Dak. Ter., Law of 1873; 1 Swan and C. (Ohio), 664; Col. Rev. Stat., 223; Md. Code, art 30, § 56.

² Penal Code, § 337.

³ Penal Code, § 338.

⁴ Penal Code, § 339.

⁵ Penal Code, § 340.

sons charged with the support of the poor in the place where the offense was committed, for the benefit of the poor.¹

Keeping Gambling Establishments.—A person who keeps a room, shed, tenement, tent, booth, building, float or vessel, or any part thereof, to be used for gambling, or for any purpose, or in any manner forbidden by chapter nine of the Penal Code, or, being the owner or agent, knowingly lets or permits the same to be so used, is guilty of a misdemeanor.² It is a violation of this provision of the Code, if one knowingly, occasionally, permits gambling in his room or office.³

Who is a Common Gambler, etc.—A person who is the owner, agent or superintendent of a place, or of any device or apparatus for gambling; or who hires, or allows to be used, a room, table, establishment or apparatus for such a purpose, or who engages as dealer, game-keeper, or player in any gambling or banking game where money or property is dependent upon the result; or who sells, or offers to sell, what are commonly called lottery policies, or any writing, paper, or document in the nature of a bet, wager, or insurance, upon the drawing or drawn numbers of any public or private lottery; or who indorses or uses a book or other document for the purpose of enabling others to sell, or offer to sell, lottery policies, or other such writings, papers, or documents, is a common gambler, and punishable by imprisonment for not more than two years, or by a fine not exceeding \$1,000, or both.⁴

Seizure of Gambling Instruments Authorized.—A person who is required or authorized to arrest any person for a violation of the provisions of chapter nine of the Penal Code, is also authorized and required to seize any table, cards, dice or other apparatus or article suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken.⁵

Such Implements, how Disposed of.—The magistrate, to

¹ Penal Code, § 341.

⁴ Penal Code, § 344.

² Penal Code, § 343.

⁵ Penal Code, § 345.

³ *Hitchins v. People*, 39 N. Y., 454.

whom anything suitable for gambling purposes is delivered pursuant to the last section of the Penal Code cited, must, upon the examination of the defendant, or, if such examination is delayed or prevented, without awaiting such examination, determine the character of the thing so delivered to him, and whether it was actually employed by the defendant in violation of the provisions of chapter nine of the Penal Code; and if he finds that it is of a character suitable for gambling purposes, and that it has been used by the defendant in violation of said chapter, he must cause it to be destroyed, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice may, in his opinion, require.¹ The officer who made the arrest and brought the implements to the magistrate, would be the proper person to carry out the directions of the magistrate in regard to their disposal.

Upon the conviction of the defendant, the district attorney must cause to be destroyed everything suitable for gambling purposes, in respect whereof the defendant stands convicted, and which remain in the possession or under the control of the district attorney.² The district attorney may direct any peace officer to destroy the articles.

Persuading Another to Visit Gaming Places.—A person who persuades another to visit any building or part of a building, or any vessel or float occupied or used for the purpose of gambling, in consequence whereof such other person gambles therein, is guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, is liable to such other person in an amount equal to any money or property there lost by him at play, to be recovered in a civil action.³

What Officers Directed to Prosecute for Offenses under Chapter nine of the Penal Code.—It is the duty of all sheriffs, constables, police officers and prosecuting or district attorneys to inform against and prosecute all persons whom they have reason to believe offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding \$500.⁴

¹ Penal Code, § 346.

³ Penal Code, § 348.

² Penal Code, § 347.

⁴ Penal Code, § 349.

Suppression of Gambling on Vessels.—If the commander, owner or hirer of any vessel or float, knowingly permits any gambling for money or property on board such vessel or float, or, if he does not, upon his knowledge of the fact, immediately prevent the same, he is punishable by a fine not exceeding \$500, and, in addition thereto, is liable to any party losing money or property by means of such gambling, in a sum equal to the money or property to be recovered in a civil action.¹

Bets, etc., on Horse-races, etc.—A person who keeps any room, shed, tenement, tent, booth or building, or any part thereof, or who occupies any place upon any public or private grounds within this State, with books, apparatus or paraphernalia for the purpose of recording or registering bets or wagers, or of selling pools; and any person who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election; or, being the owner, lessee or occupant of any room, shed, tenement, tent, booth or building, or part thereof, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary, for hire or reward, of any money, property or thing of value staked, wagered or pledged upon any such result, is punishable by imprisonment for one year, or by fine not exceeding \$2,000, or both.²

Racing of Animals.—All racing or trial of speed between horses or other animals, for any bet, stake or reward, except such as is allowed by special laws, is a public nuisance; and every person acting or aiding therein, or making or being interested in any such bet, stake or reward, is guilty of a misdemeanor, and, in addition to the penalty prescribed therefor, he forfeits to the people of this State all title or interest in any animal used with his privity in such race or trial of speed, and in any sum of money or other property betted or staked upon the result thereof.³

¹ Penal Code, § 350.

³ Penal Code, § 352.

² Penal Code, § 351.

The words "bet," "stake" or "reward," as used in the section of the Penal Code above cited, do not include "purses, prizes or premiums," as those terms are now commonly understood, in contests of speed. "A bet or wager is ordinarily an agreement between two or more, that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of any event at the present uncertain, and the stake is the money or thing thus put upon the chance. There is in them this element that does not enter into a modern purse, prize or premium, viz.: that each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. A purse, prize or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and if he abide by his offer that he must lose it and give it over to some of those contending for it is reasonably certain. Such is the meaning of the words now in common understanding, in the practical use of them, and in the legislative purview."¹

The phrase in § 352 of the Penal Code, "except such as is allowed by special laws" is not limited to the time of the adoption of the Code. It has a prospective effect, and operates to except such trotting as has been allowed by special laws existing at the time of the code's adoption or passed since that time.²

Duties of Officers of Justice Relative to Racing.—It shall be the duty of all officers concerned in the administration of justice, to attend at the place where they shall know or be informed that any race is about to be run contrary to the provisions of law, and there give notice of the illegality thereof, and endeavor to prevent such race, by dispersing the persons collected for the purpose of attending the same, and by all other ways and means in their power. Upon their own view of any persons offending, as well as upon the testimony of others, such judges and justices shall issue warrants for the immediate apprehensions of the persons so

¹ Per Folger, J., in *Harris v. White*, 81 N. Y., 539.

² *Harris v. White*, 81 N. Y., 532, 545.

offending, to the end that they may be compelled to enter into recognizance, with sufficient sureties, for their good behavior, and for their appearance at some proper court, to answer for the said offenses.¹ It may be that this section of the Revised Statutes is practically abrogated by the provisions of the Penal Code; no harm is done, however, by inserting it here.

Duties as to Excise Law.

Arrest of Offenders.—It shall be the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, policeman or officer of police, to arrest all persons actually engaged in the commission of any offense in violation of the Excise Laws, and forthwith to carry such person before any magistrate of the same city or town, to be dealt with according to the provisions of said act.² It shall also be the duty of every such officer, whenever he shall find any person intoxicated in any public place, to apprehend such person and take him before some magistrate of the same city or town, and if such magistrate shall, after due examination, deem him too much intoxicated to be examined or to answer on oath correctly, he shall direct said officer to keep him in some jail, lock-up, or other safe and convenient place until he shall become sober, and thereupon forthwith to bring him before said magistrate, whose duty it shall then be forthwith to try him for such offense. The offense of intoxication in any public place is declared an offense against the excise laws. And it is the duty of peace officers to arrest, or cause to be arrested, all such persons when so intoxicated, under the penalty of \$50 and full costs of suits, for a neglect to perform such duty.³

Duties as to Riots.

To Command Rioters to Disperse.—When persons to the number of five or more, armed with dangerous weapons, or

¹ 2 R. S. (5th ed.), 932, § 50; id. (6th ed.), 925, § 68; 3 id. (7th ed.), 1972, § 56.

² 2 R. S. (5th ed.), 942, § 17, as amended by laws of 1869, chap. 856; id. (6th ed.), 938, § 22; 3 id. (7th ed.), 1982, § 16.

³ 2 R. S. (5th ed.), 942, § 18, as amended by laws of 1869, chap. 856; id. (6th ed.), 938, § 23; 3 id. (7th ed.), 1982, § 17.

to the number of ten or more, whether armed or not, are unlawfully or riotously assembled in a city, village, or town, the sheriff of the county and his under sheriff and deputies, the mayor and aldermen of the city, or the supervisor of the town, or president or chief executive officer of the village, and the justices of the peace or the police justices of the city, village or town, or such of them as can forthwith be collected, must go among the persons assembled and command them, in the name of the people of the State, immediately to disperse.¹

Arrests.—If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, or cause them to be arrested, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.* If a person so commanded to aid the magistrates or officers neglects to do so, he is deemed one of the rioters and is punishable accordingly.³ And if a magistrate or officer having notice of an unlawful or riotous assembly, mentioned in § 106 of the Penal Code (*ante* p. 40), neglects to proceed to the place of the assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.⁴

Proceedings if Rioters do not Disperse.—If the persons assembled, and commanded to disperse, do not immediately disperse, any two of the magistrates or officers, mentioned in § 106 of the Penal Code (*ante* p. 40), may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary, to disperse the assembly and arrest the offenders.⁵

Ordering out Military.—When there is an unlawful or riotous assembly, with intent to commit a felony, or to offer violence to person or property, or to resist, by force, the laws of the State, and the fact is made to appear to the governor, or to a judge of the Supreme Court, or to a county judge, or to the sheriff of the county, or to the mayor, re-

¹ Code Crim. Pro., § 106.

⁴ Code Crim. Pro., § 109.

² Code Crim. Pro., § 107.

⁵ Code Crim. Pro., § 110.

³ Code Crim. Pro., § 108.

corder or city judge of a city, either of those officers may issue an order directed to the commanding officer of a division, brigade, regiment, battalion or company, to order his command, or any part of it (describing the kind and number of troops), to appear at a specified time and place to aid the civil authorities in suppressing violence and enforcing the law.¹ The commanding officer, to whom the order is given, must forthwith obey it; and the troops required must appear at the time and place appointed, armed and equipped with amunition as for inspection, and render such aid.² Such armed force must obey the orders, in relation to the matter for which they are thus called out, of either of the officers mentioned in section 111 of the Penal Code (*supra*).³ Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives may be endangered.⁴ When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county, by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officer having the process to execute it, he may, on application of the officer, or of the district attorney, or county judge of the county, by proclamation to be published in the State paper, and in such papers in the county as he may direct, declare the county to be in a state of insurrection.⁵ After such proclamation the governor may order into the service of the State such number and description of volunteer or uniform companies as he deems necessary, to serve for such term and under the command of such officer or officers as he may direct.⁶ When he thinks proper he may revoke such proclamation, or declare that it shall cease, at the time and in the manner directed by him.⁷

Duties as to Property Stolen or Embezzled.—"When

¹ Code Crim. Pro., § 111.

⁵ Code Crim. Pro., § 115.

² Code Crim. Pro., § 112.

⁶ Code Crim. Pro., § 116.

³ Code Crim. Pro., § 113.

⁷ Code Crim. Pro., § 117.

⁴ Code Crim. Pro., § 114.

property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof.”¹ “On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner, unless its temporary retention be deemed necessary in furtherance of justice, on his paying the reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.”² If the property be not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in his custody must, on payment of the necessary expenses incurred in its preservation, deliver it to the county superintendents of the poor, or, in the city of New York, to the commissioners of charities and corrections, to be applied for the benefit of the poor of the county or city, as the case may be,³ except in the city of New York, when money or property is taken from a defendant, arrested upon a charge of a crime, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and the other of which he must forthwith file with the clerk of the court to which the depositions and statement must be sent, as provided in section 221 of the Code of Criminal Procedure.⁴ The commissioners of police of the city of New York may designate some person to take charge of all property alleged to be stolen or embezzled, and which may be brought into the police office, and all property taken from the person of a prisoner, and may prescribe regulations in regard to the duties of the clerk or clerks so designated, and to require and take security for the faithful performance of the duties thus imposed upon them; and it shall be the duty of every officer into

¹ Code Crim. Pro., § 685.

² Code Crim. Pro., § 686.

³ Code Crim. Pro., § 689.

⁴ Code Crim. Pro., § 690.

whose possession such property may come, to deliver the same forthwith to the person so designated.¹

7. *Duties in Courts of Record.*

At General Term.—A general term must be attended by the sheriff of the county in which it is held, his under sheriff, or one of his deputies; by two constables or police officers, notified by the sheriff; by a crier for courts within the county; and by the county clerk, or his deputy, or special deputy; all of whom must act under the direction of the court, or of the presiding justice. The sheriff of the county must cause the room in which the general term is held to be properly heated, ventilated, lighted, and kept comfortably clean and in order. The court may enforce the performance of that duty by the sheriff. The sheriff must also provide the court with all necessary stationery and minute books, upon the written requisition of the court or of the justice presiding at the term.²

Expenses of Sheriff, how paid.—“The fees of a crier, a sheriff, a constable, or a police officer, for attending a general term, and all expenses incurred by a sheriff, in obedience to the last section, must be audited by the comptroller, and paid out of the treasury of the State. The fees and proper charges of the clerk, for services rendered at or preparatory to a general term, and not legally chargeable to an attorney or a party, are a county charge.”³

To Provide Court Room.—Except where other provision is made therefor by law, the board of supervisors of each county must provide each court of record, appointed to be held therein, with proper and convenient rooms and furniture, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of its business, and for the deliberation of the jury upon its retirement to consider upon its verdict. If the supervisors neglect so to do, the court may order the sheriff to make the requisite provision; and the expense incurred by him in carrying the order into effect, when certified by the court, is a county charge.⁴

¹ Code Crim. Pro., § 691.

² Code Civ. Pro., § 242.

³ Code Civ. Pro., § 243.

⁴ Code Civ. Pro., § 31; Code Crim. Pro., § 423.

When to Adjourn Court.—If a judge, authorized to hold a term of a court, does not come to the place where the term is appointed to be held, before four o'clock in the afternoon of the day so appointed, the sheriff or clerk must then open the term, and forthwith adjourn it to nine o'clock in the morning of the next day. If such a judge attends by four o'clock in the afternoon of the second day, he must open the term; otherwise the sheriff or the clerk must adjourn it without day.¹

If, before four o'clock of the second day, the sheriff or the clerk receives from a judge, authorized to hold the term, a written direction to adjourn the term to a future day certain, he must adjourn it accordingly, instead of adjourning it as prescribed in the last section. The direction must be entered in the minutes as an order.²

When to act as Crier.—A sheriff, deputy sheriff, or constable, attending a term of a court of record, must, when required by the court, act as crier therein; and he is not entitled to any additional compensation for that service.³

To Notify Constables to Attend Court.—The sheriff of each county, except New York and Kings, must, within a reasonable time before the sitting, in his county, of a special term of the Supreme Court, or a term of the Circuit Court, county court, Court of Oyer and Terminer, or court of sessions, notify, in writing and personally, as many constables of his county as he has been directed to notify by the court or the judge who is to hold or preside at the term, to appear and attend upon the term during its sitting.⁴ If such a direction has not been given by the court or the judge, the sheriff may in like manner notify as many constables as he deems necessary, for the purpose specified in the last section.⁵ The sheriff is not authorized to select any person who is not a constable for such service.⁶

Duties in Erie County.—The sheriff of the county of Erie, or his under sheriff, or a deputy sheriff, designated by him, and as many policemen of the city of Buffalo, as the court directs, must attend each term of the Buffalo Superior

¹ Code Civ. Pro., § 35.

² Code Civ. Pro., § 36.

³ Code Civ. Pro., § 92.

⁴ Code Civ. Pro., § 97.

⁵ Code Civ. Pro., § 97.

⁶ See *Day v. Mayor*, 66 N. Y., 592.

Court. A policeman, in attendance upon a term of the court, may, under the direction of the judge presiding at or holding the term, notify talesmen or additional jurors, and execute a mandate of the court, issued in a case of contempt, with like effect and in like manner as if he was the sheriff. But a policeman is not entitled to any fees, or other compensation, except his salary, for a service so performed by him.¹

In Brooklyn City Court.—The sheriff of the county of Kings, his under sheriff, or a deputy sheriff, designated by him, must attend each term or sitting of the Brooklyn city court. If a deputy sheriff is designated to attend, he shall be entitled to the same compensation as is allowed by law to messengers and attendants upon said court, and shall be paid in the same manner. The judge or judges holding the term may require more than one deputy sheriff to attend, should it be deemed necessary.²

It is the duty of the sheriff to maintain order in courts of record, during the sittings thereof, and to see that the deputies, constables and other attendants of the court, perform properly and promptly the particular duties for which they are respectively detained. He is the immediate officer of the court, and should see that every one of its orders and behests are properly carried out and obeyed.

Duties as to Jury.—While the jury in a criminal trial, and, indeed, in any trial in a court of record, are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, upon the order of the court, at the expense of the county (or, if the trial be in a city court, at the expense of the city), with suitable and sufficient food and lodging.³

Precept to Sheriff by District Attorney.—The district attorney of every county, at least twenty days before the time appointed for the holding of such, or any other, court of oyer and terminer and jail delivery, in his county, shall issue a precept to be tested and sealed, in the same manner as process issued out of the courts of oyer and terminer and jail delivery, and to be directed to the sheriff of his county.

¹ Code Civ. Pro., § 302.

³ Code Crim. Pro., § 424.

² Code Civ. Pro., § 311.

Contents of Precept.—Every such precept shall mention the time and place at which such court is to be held, and shall command the sheriff,

1. To summon the several persons who shall have been drawn in his county, pursuant to law, to serve as grand and petit jurors at the said court to appear thereat.

2. To bring before the said court, all prisoners then being in the jail of such county, together with all process and proceedings any way concerning them, in the hands of such sheriff.

3. To make proclamation in the manner prescribed by law, notifying all persons bound to appear at the said court, by recognizance or otherwise, to appear thereat; and requiring all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at such court, or who have taken any inquisition, or the examination of any prisoner or witness, to return such recognizances, inquisitions and examinations, to the said court, at the opening thereof, on the first day of the sitting.

Sheriff to Publish Proclamation.—The sheriff to whom any such precept shall be directed and delivered, immediately on the receipt thereof, shall cause a proclamation in conformity thereto, signed by him, to be published once in each week, until the sitting of the court, in one or more of the newspapers printed in the said county. The expense of such publication shall be a county charge.¹

Keepers to Jail to Furnish Calendar to Court.—It shall be the duty of the keeper of every county jail or prison, to present to every court of oyer and terminer, and to every court of general sessions of the peace, to be held in his county, at the opening of such court, a calendar stating,

1. The name of every prisoner then detained in such prison.

2. The time when such prisoner was committed, and by virtue of what process or precept.

3. The cause of the detention of every such person.²

¹ 3 R. S. (5th ed.), 298, §§ 22, 23, 24; id. (6th ed.), 230, §§ 35, 36, 37; id. (7th ed.), 2357–8, §§ 37, 38, 39.

² 3 R. S. (5th ed.), 1066, § 25; id. (6th ed.), 1066, § 25; id. (7th ed.), 2593, § 25.

The keeper of every prison to which disorderly persons may be committed, must return to the court of sessions of the county, on the first day of each term, a list of the persons so committed and then in his custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.¹

Sheriff's Report.—A report must be made by the sheriff of every county in which there is a city, on the first day of every month, to the secretary of state, of the number of persons convicted in city courts, courts of special sessions, and police courts, during the preceding month. Such reports must specify the crimes, the whole number convicted, the sex, age, nativity, and whether married or single; the degree of education, religious instruction, whether parents living or dead, temperate or intemperate, and whether before convicted or not of any crime.²

Within twenty days after the adjournment of any criminal court of record, the sheriff of the county in which such court shall be held, must report, to the secretary of state, the name, occupation, age, sex and native country of every person convicted at such court of any offense, and the degree of instruction which each person so convicted has received, and also such other items of information in relation to such convicts and their offenses, as the secretary of state shall require.³ Such report must be made in the form prescribed by the secretary of state.⁴ Any justice or judicial officer, before whom any person shall have been convicted of a criminal offense, other than in courts of record, shall furnish to the sheriffs of their respective counties, all the information they can obtain to enable such sheriffs to comply with the statutory requirements as to such report, and shall make such inquiries of the persons convicted before them, and of others, as the secretary of state shall direct.⁵ And for every neglect of magistrate or sheriff to do as thus

¹ Code Crim. Pro., § 908; and see 3 R. S. (7th ed.), 949, § 7.

² Code Crim. Pro., § 945.

³ Code Crim. Pro., § 946.

⁴ Code Crim. Pro., § 947.

⁵ Laws of 1867, chap. 604, § 7; 3 R. S. (6th ed.), 1033, § 22; id. (7th ed.), 2573, § 7.

required, he forfeits the sum of fifty dollars, to be recovered in a civil action, in the name of the people of this State.¹ The secretary of state must cause title ten of part four of the Code of Criminal Procedure (relating to Sheriffs reports and criminal statistics generally) to be published, with forms and instructions for the execution of the duties therein prescribed, and to be distributed among the officers therein mentioned, the expense of which must be paid by the treasurer on the warrant of the comptroller.²

Not to Disclose fact of Indictment found.—A judge, grand juror, district attorney, clerk, or other officer, who, except in the due discharge of his official duty, discloses, before an accused person is in custody, the fact of an indictment having been found or ordered against him, is guilty of a misdemeanor.³

In Courts of Special Sessions.—The sheriffs have no general duty in regard to courts of special sessions, and other courts of limited jurisdiction. There are times, however, when prisoners in their charge are to be brought before courts of special sessions or police courts. In such cases their duties and responsibilities are such as, in like circumstances, devolve upon constables. What those duties and responsibilities are, will fully appear in that part of this work particularly devoted to constables.⁴

Designation of Officers to Attend Albany Court of Special Sessions.—Not more than two officers shall be designated or appointed by the sheriff, or other authority, to attend the court of special sessions of Albany, unless the court shall, by an order entered in its minutes, require the attendance of a greater number.⁵

8. Power to Administer Oaths.

The sheriff or under sheriff has power to administer oaths to witnesses, produced on the trial of a claim of title by a

¹ Code Crim. Pro., § 948; and see Laws of 1867, chap. 604, § 8; 3 R. S. (5th ed.), 1036, § 28; id. (7th ed.), 2573, § 8.

² Code Crim. Pro., § 949.

³ Penal Code, § 156.

⁴ See *post*, Part III.

⁵ Code Crim. Pro., § 71.

third person to property seized by the sheriff or his deputy.¹ When the sheriff, under sheriff or deputy, or other officer, makes an arrest, and the person arrested claims to be privileged as a witness, the officer making the arrest may take his affidavit as to the facts, showing his privilege.² The sheriff may also take the affidavits required to a bond or other instrument, which he is required to take or to approve.³

Oath, How Administered.—"The usual mode of administering an oath, now practiced, by the person who swears laying his hand upon and kissing the gospel, must be observed, where an oath is administered, except as otherwise specially prescribed in this article."⁴

"The oath must be administered in the following form, to a person who so desires, the laying of the hand upon and kissing the gospels being omitted: 'You do swear, in the presence of the ever-living God.' While so swearing, he may or may not hold up his hand, at his option."⁵

"A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: 'You do solemnly, sincerely, and truly, declare and affirm.'"⁶

"If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon and kissing the gospels, is, in his opinion, more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness."⁷

"A person, believing in a religion other than the Christian, must be sworn according to the peculiar ceremonies of his religion, if any, instead of one of the methods prescribed in the foregoing sections of this article."⁸

"The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a

¹ Code Civ. Pro., § 108; id., § 843.

⁵ Code Civ. Pro., § 846.

² Code Civ. Pro., § 864.

⁶ Code Civ. Pro., § 847.

³ Code Civ. Pro., § 843.

⁷ Code Civ. Pro., § 848.

⁴ Code Civ. Pro., § 845.

⁸ Code Civ. Pro., § 849.

witness, what peculiar ceremonies in swearing he deems most obligatory.”¹

A person swearing, affirming, or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon and kissing the gospels.²

9. *Drawing and Summoning Jurors.*

Grand Jurors, how Drawn.—At the times of drawing the names of jurors for the trial of issues of fact, in any Court of Oyer and Terminer, and at the time of drawing such jurors for the general session in the city of New York, or for any term of the court of common pleas in any county at which a general session may be held by law, the county clerk, in the presence and with the assistance of the sheriff or under sheriff, and of a county judge or justice of the peace, or two county judges or justices of the peace, who shall have attended for the purpose of drawing the petit jury for such court, shall proceed and draw in and for the city of New York the names of thirty-six persons, and in every other county the names of twenty-four persons, from the box in which the pieces of paper shall have been deposited for that purpose, to serve as grand jurors at such Court of Oyer and Terminer or general sessions, as the case may be. Such drawing shall be conducted in all respects, in the manner prescribed by law for drawing petit jurors (*post*, p. 67); a minute of such drawing shall be kept, signed and filed in the like manner; and a list of the persons so drawn, with their additions and places of residence, and specifying for what court they shall have been drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the sheriff of the county.³

¹ Code Civ. Pro., § 850.

² Code Civ. Pro., § 851.

³ 3 R. S. (5th ed.), 1013, 1014, §§ 10, 11; *id.* (6th ed.), 1016, §§ 10, 11; *id.* (7th ed.), 2559, §§ 10, 11. (Since the time of writing the above text the New York City Consolidated Act of 1882 [§§ 1636-1651], has provided a method for drawing and empanelling a grand jury in the city and county of New York, and the law stated in the text has been, in that regard, abrogated.)

How Summoned.—The sheriff shall summon the persons named in such list, to attend such court as grand jurors, at least six days previous to the sitting of such court, by giving personal notice to each person, or by leaving a written notice at his place of residence, with some person of proper age. He shall return such list to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was notified.¹

Additional Grand Jurors, how Drawn and Summoned.—If, at any Court of Oyer and Terminer, or court of sessions, except in the counties of Genesee, Orleans and St. Lawrence, there shall not appear at least sixteen persons, duly qualified to serve as grand jurors, who have been summoned, or, if the number of grand jurors attending, shall be reduced below sixteen, such court must, by order to be entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of grand jurors as shall be necessary, and must specify the number required in the order.² The clerk of the county must forthwith bring into the court the box containing the names of the grand jurors, from which grand jurors in the county are required to be drawn; and he must, in the presence of the court, proceed publicly to draw the number of grand jurors specified in the order, and, when such drawing is completed, he must make two lists of the persons so drawn by him, one of which he must file in his office, and the other he must deliver to the sheriff.³ The sheriff must accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated in the list provided in section 231 of the Code of Criminal Procedure, to appear in the court requiring their attendance at the time designated; and they must attend and serve as if they had been originally summoned as grand jurors, and subject to the same penalties, unless excused or discharged by the court.⁴ In the counties of Genesee, Orleans and St. Law-

¹ 3 R. S. (5th ed.), 1014, § 12; id. (6th ed.), 1016, § 12; id. (7th ed.), 2560, § 12.

² Code Crim. Pro., § 230.

³ Code Crim. Pro., § 231.

⁴ Code Crim. Pro., § 232.

rence, the names of the persons required to complete the grand jury may, in the discretion of the court, be drawn as thus provided, or may be publicly designated by the court, from the by-standers, or the body of the county.¹ The sheriff must, accordingly, in the manner required in respect to the grand jurors originally drawn, forthwith summon the persons whose names are drawn or designated, who must attend and serve as if they had been originally summoned as grand jurors, and are subject to the same penalties, unless excused or discharged by the court.² If a crime be committed during the setting of the court, after the charge of the grand jury, the court may, in its discretion, direct an order to be entered, that the sheriff summon another grand jury, and the same shall be summoned in the manner prescribed for grand juries in general.³

Misconduct at Drawing or Impaneling of Jurors.—A person authorized by law to assist at the drawing or impaneling of grand or trial jurors to attend a court, or a term of a court, or to try any cause or issue, who either—

1. Designedly puts, or consents to the putting, upon the list of jurors, as having been drawn, any name which was not lawfully drawn for that purpose ; or,

2. Designedly omits to place on such list any name which was lawfully drawn ; or,

3. Designedly signs, or certifies, a list of such jurors as having been drawn, which was not lawfully drawn ; or,

4. Designedly withdraws from the box, or other receptacle, for the ballots containing the names of such jurors, any paper or ballot lawfully placed or belonging there, and containing the name of a juror, or omits to place in such box or receptacle any name lawfully drawn or designated, or places in such box or receptacle a paper or ballot containing the name of a person not lawfully drawn and designated as a juror ; or,

5. In the drawing of such jurors, does any act which is unfair, partial, or improper in any other respect, is guilty of a misdemeanor.⁴ But this provision of the Penal Code

¹ Code Crim. Pro., § 233; as amended by Laws 1882, chap. 360.

² Code Crim. Pro., § 234.

³ Code Crim. Pro., § 235.

⁴ Penal Code, § 76.

does not apply to the city and county of New York, or to the county of Kings.¹

Trial Jurors, how Drawn.—"On a day, designated by the county clerk, not less than fourteen, nor more than twenty days, before the day appointed for holding each term of the Circuit Court; or of the Court of Oyer and Terminer, where a Circuit Court is not appointed to be held at the same time; or of the county court, except a term designated for the hearing and decision of motions, and trials and other proceedings, without a jury; or of the court of sessions, where a term of the county court is not appointed to be held at the same time; or of a mayor's or recorder's court, at which issues are triable by a jury; or on the day to which the drawing is adjourned, as prescribed in section 1045 of this act, the clerk of the county, in which the term is to be held, must draw the names of thirty-six persons, and any additional number, ordered according to law, to serve as trial jurors at the term."²

"At least six days before the drawing, the county clerk must publish a notice thereof, in a newspaper published in the county, if there is one; or, if there is none, he must affix a notice thereof, on the outer door of the building, where the term, for which the jurors are to be drawn, is appointed to be held. He must also, at least three days before the time appointed for the drawing, cause notice thereof to be served upon the sheriff of the county, and upon the county judge, or, in case of his absence, upon the special county judge, or in a county where there is no special county judge, upon a justice of sessions."³

"At the time so appointed, the sheriff of the county, or his under sheriff, and the county judge, or, if notice has been served upon another officer, in the absence of the latter, as prescribed in the last section, either the county judge, or that officer, or both, must attend at the clerk's office of the county, to witness the drawing of the jurors."⁴

"If the sheriff or under sheriff, and either the county judge, or, in a case specified in the last section, an officer in place of the county judge, do not appear, the clerk must

¹ Penal Code, § 76, last clause.

² Code Civ. Pro., § 1042.

³ Code Civ. Pro., § 1043.

⁴ Code Civ. Pro., § 1044.

adjourn the drawing of the jurors to the next day. Thereupon, the clerk must forthwith cause to be served upon the absent sheriff or county judge, or two or more justices of the peace of the county, notice to attend the drawing on the adjourned day.”¹

“If the sheriff or under sheriff, and the county judge, or if the sheriff, under sheriff, or county judge, together with two justices of the peace of the county, appear at the adjourned day, but not otherwise, the clerk must proceed, in the presence of the officers so appearing, to draw the jurors.”²

“The drawing must be conducted as follows :

1. The clerk must shake the box containing the ballots, so as thoroughly to mix them.

2. He must then, without seeing the name contained in any ballot, publicly draw out of the box one ballot ; and continue to draw, in like manner, one ballot at a time, until the requisite number has been drawn.

3. A minute of the drawing must be kept, by one of the attending officers, in which must be entered the name contained in each ballot drawn, before another ballot is drawn.

4. If, after drawing the requisite number, the name of a person has been drawn, who is dead, or insane, or who has permanently removed from the county, to the knowledge of an attending officer, an entry of that fact must be made in the minute of the drawing, and the ballot, containing that person's name, must be destroyed. Whereupon, another ballot must be drawn, in its place, and the name contained therein must be entered, in like manner, in the minute of the drawing.

5. The same proceedings must be had, as often as necessary, until the requisite number of jurors has been obtained.

6. The minute of the drawing must then be signed by the clerk, and the other attending officers, and filed in the clerk's office.

7. A list of the names of the persons so drawn, showing the place of residence, and other proper additions, of each of them, and specifying for what court and term they were drawn, must be made and certified by the clerk, and the

¹Code Civ. Pro., § 1045.

²Code Civ. Pro., § 1046.

other attending officers, and delivered to the sheriff of the county.”¹

Jurors, how Summoned.—“The sheriff must, at least six days before the day appointed for holding the term, serve, upon each person named in the list, personally, or by leaving it at his residence, with a person of proper age and discretion, a written notice to attend the term. He must file the list with the clerk of the court at or before the opening of the term ; with a return, indorsed thereupon, or annexed thereto, under his hand, naming each person notified and specifying the manner in which he was notified.”²

To Furnish List of Jurors.—“The county clerk, or the sheriff must furnish a copy of the list of trial jurors, drawn to attend a term, to any person applying to him therefor, and paying the fees allowed by law.”³

Disposition of Ballot after Term of Court.—“After the adjournment of the term, at which trial jurors have been returned, as prescribed in the last section but one, the clerk must deposit the ballots, containing the names of those who attended and served, in another box, kept by him. The ballots, containing the names of those who did not appear and serve, which have not been destroyed, as prescribed in article first of this title, must be returned to the box from which they were taken.”⁴

“If, at the time of drawing trial jurors for a term, there is not a sufficient number of ballots remaining in the first box, the clerk, after drawing all the ballots therein, must draw the necessary number from the second box, containing the name of those jurors who have before served, as prescribed in the last section ; and must continue to draw from the box, until new lists of jurors are transmitted by the town officers.”⁵

Additional Jurors.—“The county clerk must keep, in addition to the two boxes specified in the last two sections, a third box, in which he must deposit duplicate ballots, containing the names, with the proper additions, of all persons, selected and returned as trial jurors, who reside in

¹ Code Civ. Pro., § 1047.

² Code Civ. Pro., § 1048.

³ Code Civ. Pro., § 1049.

⁴ Code Civ. Pro., § 1050.

⁵ Code Civ. Pro., § 1051.

the city or town, where a trial term of a court of record is appointed to be held, pursuant to law-”¹

“The ballots, kept in the third box, must be destroyed, by the clerk, and new ballots must be deposited therein by him, at the same time, and under like circumstances, as prescribed in this article, with respect to the destruction of the old ballots, and the depositing of new ballots, in the first box.”²

“If a sufficient number of trial jurors, duly drawn, and notified, do not attend or cannot be obtained, to form a jury, the court may, in its discretion, direct the sheriff to draw from the third box, in the presence of the court, the names of as many persons, as the court deems sufficient for that purpose.”³

“The sheriff must forthwith notify each person so drawn, and make a return, as prescribed in title fifth of this chapter, where talesmen are required to attend; and the provisions of that title apply to each person so notified.”⁴

“A justice of the Supreme Court, appointed to hold a term of the Circuit Court, or to preside at a term of the Court of Oyer and Terminer, may, by an order under his hand, direct that such a number of jurors, as he deems necessary, not exceeding twenty-four, be drawn for that term, in addition to the thirty-six jurors, to be drawn as prescribed in the foregoing sections of this article. A county judge may, in like manner, direct the drawing of a like additional number of jurors, for a term of the county court, or of the court of sessions, to be held in his county.”⁵

An order, made as prescribed in the last section, must be delivered to the clerk of the county, in which the term is to be held, at least twenty days before the day appointed for the commencement thereof; and the clerk must forthwith file it. This article applies to the additional jurors, so required to be drawn.”⁶

“At a term of the circuit court, or court of oyer and terminer, or of the county court, or court of sessions, an order

¹ Code Civ. Pro., § 1052.

⁴ Code Civ. Pro., § 1055.

² Code Civ. Pro., § 1053.

⁵ Code Civ. Pro., § 1056.

³ Code Civ. Pro., § 1054.

⁶ Code Civ. Pro., § 1057.

may be made by the court, requiring the clerk of the county to draw, and the sheriff to notify, any number of trial jurors, specified in the order, which the court deems necessary, to attend that term, or a term thereafter to be held, either by original appointment or by adjournment, at the commencement thereof, or on a particular day, specified in the order.”¹

“The clerk must thereupon forthwith bring into court, all the boxes, wherein ballots, containing the names of trial jurors are deposited, as prescribed in this article; and must in the presence of the court, publicly draw from such box or boxes as the court directs, the number of trial jurors specified in the order. The clerk must make and certify two lists of the persons so drawn; and must file one list in his office, and deliver the other to the sheriff. The sheriff must thereupon immediately notify each person so drawn, to attend, as specified in the order.”²

“The county judge may, at the time of drawing trial jurors to attend a term of the county court, or court of sessions, make an order, designating a particular day, during the term, when the jurors must attend, or two or more particular days, upon each of which a portion of the jurors must attend. The sheriff must thereupon notify them to attend, as specified in the order.”³

“The deputy county clerk possesses, in the absence of the county clerk from his office, or from the sitting of a term of the court, the powers conferred by this article upon the county clerk.”⁴

“This article does not apply to the city and county of New York, or to the county of Kings.”⁵

Struck Jury, how Summoned.—The county clerk, deputy clerk, or commissioner superintending the striking of a jury, must deliver to the sheriff of the county a certified copy of the order of the court, directing a struck jury, and a certified list of the persons drawn to serve as jurors pursuant to such order; thereupon the sheriff must notify the persons whose names are contained in the list; and must return the names of those notified, to the term, at which they are re-

¹ Code Civ. Pro., § 1058.

⁴ Code Civ. Pro., § 1061.

² Code Civ. Pro., § 1059.

⁵ Code Civ. Pro., § 1062.

³ Code Civ. Pro., § 1060.

quired to attend, as prescribed by law for notifying and returning ordinary trial jurors.¹

Foreign Jury.—Where an order for a trial by a foreign jury is made, a certified copy thereof must be delivered to the sheriff of the county, from which it is to be drawn; who must give notice thereof to the clerk of that county, and also, in the city and county of New York, or the county of Kings, to the commissioner of jurors, at least twenty days before the first day of the term, at which the foreign jury is required to attend.²

The clerk, or, in the county of Kings, the commissioner, to whom the notice is given, must draw the names of twenty-four persons, in the same manner, and in presence of the same officers, as prescribed by law, with respect to ordinary trial jurors; except that notice of the drawing need not be published. A certified list of the names drawn must be delivered to the sheriff, who must notify each person drawn, and make a return, as in an ordinary case.³

Jurors in New York County.—So far as they appertain to the duties of the sheriff with reference to the drawing of jurors, the proceedings in New York county are the same as prescribed above for other counties.⁴

The drawing must be conducted as follows:

1. The county clerk, or his deputy, must shake the box containing the ballots, so as thoroughly to mix them.

2. He must then, without seeing the name contained in any ballot, publicly draw out of the box, one ballot, and continue to draw, in like manner, one ballot at a time, until the requisite number has been drawn.

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name, contained in each ballot drawn, before another ballot is drawn.

4. After drawing the requisite number, the minute of the drawing, containing the names of the persons drawn, with the proper additions of each, and specifying for what court and for what term they were drawn, must be signed by the

¹ Code Civ. Pro., §§ 1065, 1066.

² Code Civ. Pro., § 1070.

³ Code Civ. Pro., § 1071.

⁴ Code Civ. Pro., §§ 1099–1102.

clerk or his deputy, and the attending officers, and filed in the clerk's office.¹

If the term consists of two or more separate parts, the trial jurors for each part must be drawn, and a minute of the drawing must be made, signed, and filed, and the subsequent proceedings must be the same, as if it was a distinct term.²

The clerk must deliver, to the sheriff, a certified copy of the minute, or of each minute, if there are two or more. The sheriff must notify each juror, named therein, to attend the term or part, for which he was drawn, by serving upon him, at least six days before the commencement thereof, a notice, addressed to him, stating that he has been drawn as a trial juror for, and is required to attend, the term or part, specified in the notice. The notice may be served personally, or by leaving it at the juror's residence, or usual place of business, with a person of proper age and discretion. Before the commencement of the term or part, the sheriff must file, with the clerk, the certified copy of the minute, with a return, under his hand, indorsed thereupon, or annexed thereto, naming each person notified, and specifying the manner in which he was notified.³

Where a person, duly drawn and notified, fails to attend and serve, at a term of a court of record, as required by law without having been excused, the court, besides imposing a fine, may direct the sheriff to arrest him, and bring him before the court; and, when he has been so brought, it may, in its discretion, compel him to serve.⁴ This provision has reference only to New York county.

Sheriff's Jury in New York County, how Selected.—“The board for the selection of grand jurors must, at the time when it selects the grand jurors for each jury year, also select, from the lists of trial jurors for that year, the names of no less than one hundred and twenty, nor more than one hundred and fifty persons, to constitute the sheriff's jurors, for that jury year. The commissioner of jurors must forthwith transmit, to the sheriff of the city and county of New York, a list, certified by him, contain-

¹ Consol. Act of 1882, § 1676.

² Id., § 1677.

³ Id., § 1679.

⁴ Id., § 1683.

ing the names of the persons so selected, with the proper additions of each, and showing that they have been selected, as prescribed in this section. The sheriff must cause ballots to be prepared, as prescribed in article second of title third of chapter ten of the Code of Civil Procedure, and to be deposited in a proper box. Where the sheriff is authorized or required by law, to empanel a jury for any purpose, the requisite number of ballots must be drawn from the box, as prescribed in that article, by the sheriff, or by his under sheriff, or deputy sheriff. But the sheriff may, in his discretion, divide the names contained in the list, into three panels, each containing an equal number of names, as nearly as may be. In that case, he must designate the months, in which each panel will be used, so that the jury duty shall be distributed equally, as nearly as may be, among the jurors; and ballots shall be deposited in the box, at the beginning of each month, containing the names of the jurors designated for that month.”¹

Proceedings to Remit or Enforce Jury Fines in New York County.—“The commissioner of jurors must cause a notice to be served upon each delinquent trial juror, returned as having been fined, stating the amount of the fine and the term at which he was fined, and requiring him to attend before the commissioner, at the latter’s office, on a specified day, and at a specified hour, and show cause, if he has any, why the fine should be wholly or partly remitted, or why payment of the fine should not be enforced. The notice must be served at least six days before the day therein specified. If the sheriff’s return shows that notice to attend, as a trial juror, was personally served upon the person fined, the notice to show cause, as prescribed in this section, may be served upon him, either personally or by leaving it at his residence, or usual place of business, with a person of suitable age and discretion; otherwise it must be served upon him personally. If a person so notified fails to attend, the fine must be enforced. If he attends, he may demand a hearing

¹ Id., § 1685. The method of preparing the ballots as prescribed in article second, title third, of the chapter referred to in the section, is the method used in the selection of jurors in ordinary cases in the counties other than New York and Kings.

before the board for the enforcement of jury fines; otherwise the commissioner must decide with respect to the remission of the whole or any part of the fine, and the sufficiency of the cause shown, if any; and his decision is conclusive, with respect to that fine, unless the person fined, within ten days thereafter, serve upon him a written demand of a hearing before the board of enforcement. In that case the commissioner must appoint a time for the hearing; and the person fined must then attend, without further notice.”¹

The board for the enforcement of jury fines may compel the attendance of any person required to appear before it. It may issue a warrant, directed to the sheriff of the city and county of New York, commanding him to arrest and bring before the board a person who fails to attend at the time appointed for hearing his case, or to pay a fine imposed upon him, and not remitted by the board. If a delinquent trial juror, duly drawn, and returned by the sheriff as personally notified to attend a term, or personally notified to attend before the commissioner, is, in the opinion of the board, able to pay his fine, the board may make an order directing the sheriff to arrest him and imprison him in the county jail, until the fine is paid, not exceeding thirty days. The sheriff must obey such an order. The board may make an order directing that a person paying a fine imposed upon him, be excused from jury duty for a period not exceeding one year.²

“After ten days have expired, since the final decision of the board of enforcement, with respect to a fine, as prescribed in the last section but one, if the fine has not been remitted or paid, the commissioner must issue a warrant, under his hand, directed to the sheriff of the city and county of New York, reciting the facts and commanding the sheriff to collect from each person, named in the schedule annexed thereto, the sum, set opposite that person’s name in the schedule, and to pay over the same to the commissioner. The schedule must contain the names of persons, fined and notified to show cause, whose fines have not been wholly paid or remitted; it must show the amount of each fine,

¹ Consol. Act of 1882, § 1636.

² Id., § 1688.

remaining unremitted or unpaid ; and the residence or usual place of business of each person fined, as far as it can be conveniently ascertained. The sheriff must collect each fine, by a levy upon and sale of the personal property of the person fined, as prescribed by law, where an execution against property is issued upon a judgment, rendered in a court of record. The sheriff is entitled, in each case, to the same fees as upon such an execution, to be collected in the same manner. He must return the warrant and schedule, with his proceedings thereupon, to the commissioner, within thirty days after the delivery thereof to him ; and must then pay over the money collected, less his fees. His return may be compelled by the Supreme Court, in the same manner as the return of an execution against property, issued upon a judgment rendered in that court. For his failure to collect a fine, an action may be maintained against him, in a case where such an action may be maintained by a judgment creditor, against a sheriff failing to collect an execution against property, and with like effect. The provisions of section 1692 of this act apply to such an action.”¹

“The corporation attorney of the city of New York must, when required by the commissioner of jurors, prosecute, in the proper court, an action for the collection of each penalty, incurred as prescribed in this title ; unless he is satisfied, upon an examination of the case, that there is a defense to the action. The action must be maintained in the name of the mayor, aldermen and commonalty of the city of New York, as plaintiffs. The commissioner, with the assent of the corporation attorney, may compromise, settle, or discontinue, an action so brought. From the proceeds of an action, prosecuted to judgment and execution, or compromised, as prescribed in this section, the corporation attorney may retain the taxable or taxed costs. He must pay over the remainder, to the commissioner.”²

Accepting Bribe to aid in Evading Jury Duty in New York County.—“An officer, or a person employed by the sheriff, by the commissioner of jurors, or by the county clerk, or other clerk of a court, who takes money, or any

¹ Consol. Act of 1882, § 1689.

² Id., § 1692.

other thing, as a gift, bribe, or payment, for the purpose of enabling or assisting a person, named or drawn as a trial juror, to evade, or to be discharged, exempted, or excused from jury duty; or who willfully and knowingly prevents or hinders the execution of any provision of this title, is guilty of a misdemeanor.”¹

Summoning Jurors in Kinys County.—“Immediately after each drawing of trial jurors, the commissioner must prepare a panel, verified by his affidavit, containing the names of the jurors drawn, with the proper additions of each, and stating for what court and for what term, they were drawn. He must transmit the panel to the sheriff of the county, who must keep it on file in his office for public inspection. The sheriff must forthwith notify each juror named therein, to attend the term for which he was drawn, by serving upon him a notice to that effect, addressed to him. The notice may be served personally, or by leaving it at the juror’s residence, or usual place of business, with a person of proper age and discretion. It must specify the days, during which the juror is required to be present; and it may contain copies of such portions of this article, as the sheriff deems proper.”²

“The thirty-six trial jurors, first drawn for a term, or such other number as the judge, appointed to hold or preside at the term, directs, must be notified to be present, during the first six days of the term; and the thirty-six trial jurors next drawn, or such other number as the judge directs, must be notified to be present, during the next six days of the term; and a like number during each succeeding six days. The judge holding or presiding at the term, may, in his discretion, on the application of a trial juror, excuse him, from the whole or a part of the time of service, required of him. The judge may also change the time of service of a juror to a later day, during the same, or a subsequent term of the court. Each juror, whose time of service is changed to a day certain, must attend, at the opening of court on that day, and thereafter until discharged, without further notice. If he fails so to do, he is liable to

¹ Id., § 1696.

² Code Civ. Pro., § 1146.

the same punishment, as if he had been personally notified by the sheriff, to attend the term, and to be present on that day. The clerk of the court must enter in a book, kept for that purpose, the name of each juror who is so excused, or whose time of service is changed.”¹

“Before the commencement of each term of a court, for which trial jurors have been drawn, as prescribed in this article, the sheriff must file, with the clerk, the panel, or a copy of the panel, with a return, under his hand, indorsed thereupon, or annexed thereto, showing the name and additions of each juror notified, the days during which he was notified to attend, and the manner in which he was notified.”²

Additional Jurors in Kings County.—“At any time during the sitting of a term of a court of record in the county, the court may direct an additional number of trial jurors, to be drawn for that term. The order must specify the number to be drawn, and the time of drawing. The drawing must be conducted as prescribed in sections 1141, 1142, and 1143 of this act, except that notice is not required. The sheriff must forthwith notify each juror drawn, by such a notice as the court directs, to attend the term, at the time specified in the order.”³

“In a special proceeding pending before the county judge of Kings county, in which a trial jury is necessary, the judge may empanel a jury, from the trial jurors, who are serving, at the time, in the court of sessions of the county. In a special proceeding, pending before a judge of the city court of Brooklyn, in which a trial jury is necessary, the judge may empanel a jury, from the trial jurors, who are serving, at the time, in that court. If there are no jurors serving in the court of sessions, or in the city court, as the case may be, the judge may make an order, requiring the commissioner of jurors to draw the number of trial jurors, designated therein; whereupon the commissioner must draw the requisite number, and the sheriff must notify them, as prescribed in this article, for drawing and notifying other trial jurors.”⁴

¹ Code Civ. Pro., § 1147.

³ Code Civ. Pro., § 1149.

² Code Civ. Pro., § 1148.

⁴ Code Civ. Pro., § 1150.

Drawing Trial Jurors for Buffalo Superior Court.—At least fourteen days before the time appointed for holding a term of the court, where issues of fact in civil or criminal causes are triable, the clerk of the court, in the presence of a judge thereof, must draw from the list so returned by the assessors, the names of thirty-six persons, or such other number as the court, at any term thereof, directs, to serve as trial jurors. The drawing must be conducted as prescribed by law, for the drawing of the trial jurors by a county clerk, except that notice thereof is not necessary. A list of the names of the persons drawn must be certified by the clerk and attending judge, and delivered to the sheriff of Erie county.¹

The sheriff must thereupon notify each of the persons so drawn, as prescribed by law for notifying a juror drawn to attend a term of the circuit court. Before the first day of the term, the sheriff must file the list with the clerk, accompanied with his return, specifying who were notified, and the manner in which each person was notified. The clerk must make the same disposition of the ballots, containing the names of the jurors who have served, of those who did not appear, and of those who were discharged, as prescribed by law, with respect to the circuit court. Each juror, attending a term of the court, must be paid by the county of Erie the same compensation as a juror attending the circuit court.²

At a term where issues of fact, in civil or criminal causes, are triable, the court may, in its discretion, direct additional jurors to be drawn from any list returned by the assessors, and require the sheriff, or a policeman in attendance upon the term, forthwith to notify them to attend; and if a person so drawn cannot be found, the court may cause his name to be returned to the box.³

Jurors, in Proceedings to lay out Turnpike or Plank Road, how Summoned.—The judge drawing the number from the jurors drawn, which he deems necessary to secure the attendance of twelve, shall issue his precept, directed to the sheriff of the proper county, either of his deputies or

¹ Code Civ. Pro., § 304.

³ Code Civ. Pro., § 306.

² Code Civ. Pro., § 305.

any constable of the county.¹ Every juror named in any such precept, shall, at least four days before the day therein specified for his attendance, be summoned, personally, or by leaving at his residence a notice containing the substance of such precept. The officer serving such precept, shall return it to the said judge, with an affidavit of the manner of serving the same, and of the distance necessarily traveled by him for that purpose; and such officer shall receive for making such service, six cents a mile for the distance so traveled.²

Deputy may Summon Jury.—There is nothing in the statute which confines the exercise of the power of selecting the jury to the sheriff *personally*. As a general principle, he may execute any ministerial power by deputy. Where the law gives to the sheriff, or his deputy, the power to select jurors in a particular proceeding, the officer should exercise care to see that the persons he summons as jurors are qualified to serve as such. But after the officer has actually selected a juror, and duly summoned him to attend the court, he has no authority to substitute another in his place.³ Once a juror is duly summoned, the sheriff's power as to him is spent. He cannot regularly discharge him.

Qualifications of Trial Jurors.—In order to be qualified to serve as a trial juror, in a court of record, except in New York and Kings counties, a person must be:

1. A male citizen of the United States, and a resident of the county.
2. Not less than twenty one, nor more than sixty years of age.
3. Assessed, for personal property, belonging to him, in his own right, to the amount of two hundred and fifty dollars; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of one hundred and fifty dollars; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right.

¹ Laws of 1847, chap. 210, § 16; 2 R. S. (7th ed.), 1331, § 16.

² Laws of 1847, chap. 210, § 17; 2 R. S. (7th ed.), 1331, § 17.

³ President, etc., of *Brooklyn v. Patchen*, 8 Wend., 47.

4. In the possession of his natural faculties, and not infirm or decrepit.

5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment, and well informed.¹

But a person who was assessed, on the last assessment-roll of the town, for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made, to the value of one hundred and fifty dollars, is qualified to serve as a trial juror, although he does not possess either of the qualifications, specified in subdivision third of the last section, if he is qualified in every other respect.²

Who Disqualified as Jurors.—Each of the following officers is disqualified to serve as a trial juror:

1. The governor, the lieutenant-governor, the governor's private secretary.

2. The secretary of state, the comptroller, the state treasurer, the attorney-general, the state engineer and surveyor, a canal commissioner, an inspector of state prisons, a canal appraiser, the superintendent of public instruction, the superintendent of the bank department, the superintendent of the insurance department, and the deputy of each officer, specified in this subdivision.

3. A member of the legislature, during the session of the house, of which he is a member.

4. A judge of a court of record, or a surrogate.

5. A sheriff, under sheriff, or deputy sheriff.

6. The clerk or deputy clerk of a court of record.³

Who may Claim Exemption.—Each of the following persons, although qualified, is entitled to exemption from service, except in New York and Kings counties, as a trial juror, upon his claiming exemption therefrom:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.

2. A resident officer of, or an attendant, assistant teacher, or other person, actually employed in, a State asylum for lunatics, idiots, or habitual drunkards.

¹ Code of Civ. Pro., § 1027, and see § 1034.

² Code of Civ. Pro., § 1028, and see § 1034.

³ Code Civ. Pro., § 1029.

3. The agent or warden of a State prison ; the keeper of a county jail, or a person actually employed in a State prison or county jail.

4. A practicing physician or surgeon, having patients requiring his daily professional attention.

5. An attorney and counsellor at law, regularly engaged in the practice of the law, as a means of livelihood.

6. A professor or teacher, in a college or academy.

7. A person actually employed in a glass, cotton, linen, woolen, or iron manufacturing company, by the year, month or season.

8. A superintendent, engineer, or collector, on a canal, authorized by the laws of the State, which is actually constructed and navigated.

9. A master, engineer, assistant-engineer, or fireman, actually employed upon a steam-vessel, making regular trips.

10. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company ; or an operator, or assistant-operator, employed by a telegraph company, who is actually doing duty in an office, or along the railroad or telegraph line of the company, by which he is employed.

11. An officer, non-commissioned officer, musician or private of the national guard of the State, performing military duty ; or a person who has been honorably discharged from the national guard, after five years' service, in either capacity.

12. A person who has been honorably discharged from the military forces of the State, after seven years' faithful service therein. But in order to entitle a person to exemption, under this subdivision, his service must have been performed before the 23d day of April, 1862, either as a general or staff-officer, or as an officer, non-commissioned officer, musician or private, in a uniformed battalion, company or troop of the militia of the State, and armed, uniformed and equipped, according to law ; or a portion thereof, during that period and in that capacity, and the remainder since the 23d day of April, 1862, as a member of the national guard of the State.

13. A member of a fire company, or fire department, duly organized according to the laws of the State, and perform-

ing his duties therein; or a person who, after faithfully serving five successive years in such a fire company, or fire department, has been honorably discharged therefrom.

14. A person otherwise specially exempted by law.¹

The qualifications, disqualifications and exemptions, with reference to jurors in New York and Kings counties, are substantially the same as are given above. The sheriffs, and other officers in those counties, may readily acquaint themselves with the differences by consulting the Code of Civil Procedure, sections 1126, 1127, as to Kings County; and sections 1652 to 1655 of the Consol. Act of 1882 as to New York county. There are other exemptions which may be claimed as statute prescribes. Firemen, policemen and others, may claim exemption. It is not necessary here to detail these various exemptions. The sheriff should summon those who are qualified to serve. If the statute permits one thus summoned to claim the exemption, he should so make his claim to the court which he is summoned to attend, and not to the officer about to summon him. Once summoned, none but the court can regularly discharge a juror qualified to serve.

10. *When Powers Cease; and Duties as to Incoming Sheriff.*

Certificate to New Sheriff.—Where a new sheriff has been elected or appointed, and has qualified and given the security required by law, the clerk of the county must furnish to the new sheriff a certificate, under his hand and official seal, stating that the person so appointed or elected, has so qualified and given security.²

When Outgoing Sheriff's Power Ceases.—Upon the commencement of the new sheriff's term of office, and the service of the certificate on the former sheriff, the latter's powers as sheriff cease, except as otherwise expressly prescribed by law. But, notwithstanding the election or appointment of a new sheriff, the former sheriff must return, in his own name, each mandate which he has fully executed; and must proceed with and complete the execution of each mandate which he has begun to execute, by the col-

¹ Code Civ. Pro., § 1030; and see § 1034.

² Code Civ. Pro., § 182.

lections of money thereon, or by a seizure of or levy upon money, or other property in pursuance thereof.¹ The authority of the deputy continues as long as the authority of the principal. Hence he, too, may complete the execution of process, after the expiration of his principal's term, which he had begun within the term. But if an under sheriff or a deputy be removed by a sheriff, or if he resign before the expiration of his principal's term, at once, his power as deputy ceases. He cannot complete the execution of process theretofore begun, or do any other act as under sheriff or deputy.² Although his term of office has expired, the sheriff and his deputies may serve process until the principal is served with the certificate of the clerk of the county, that his successor has qualified and given security.³

To Deliver Jails, etc., to Successor.—Within ten days after the service of the certificate, upon the former sheriff he must deliver to his successor:

1. The jail, or if there are two or more, the jails of the county, with all their appurtenances, and the property of the county therein.

2. All the prisoners then confined in the jail or jails.⁴

3. All process, orders, commitments, and all other papers and documents, authorizing, or relating to the confinement or custody of a prisoner, or, if such a process, order, or commitment has been returned, a statement in writing of the contents thereof, and when and where it was returned.

4. All mandates, then in his hands, except such as he has fully executed, or has begun to execute, by the collection of money thereon, or by a seizure of or levy on money or other property, in pursuance thereof.⁴

At the time of the delivery, the former sheriff must execute an instrument, reciting the property, documents, and prisoners delivered, specifying particularly the process or other authority, by which each prisoner was committed and is detained, and whether the same has been returned or is delivered to the new sheriff. The instrument must be de-

¹ Code Civ. Pro., §§ 183, 186; *Sauvinet v. Maxwell*, 26 La. Ann., 280.

² *Ferguson v. Lee*, 9 Wend., 258; *Ross v. Campbell*, 19 Hun, 615.

³ *Curtis v. Kimball*, 12 Wend., 275; *Thrower v. State*, 52 Ala., 22.

⁴ Code Civ. Pro., § 184.

livered to the new sheriff, who must acknowledge, in writing, upon a duplicate thereof, the receipt of the property, documents and prisoners, therein specified; and deliver such duplicate and acknowledgment to the former sheriff.¹

Where a person, arrested by virtue of an order of arrest, is confined, either in jail, or to the liberties thereof, at the time of assigning and delivering the jail to the new sheriff, the order, if it is not then returnable, must be delivered to the new sheriff, and be returned by him at the return day thereof, with the proceedings of the former sheriff and of the new sheriff thereon.²

Duty of Incoming Sheriff on Refusal to Deliver by Outgoing Sheriff.—"If the former sheriff neglects or refuses to deliver to his successor, the jail, or any of the property, documents or prisoners in his charge, as prescribed in this title, his successor must, notwithstanding, take possession of the jail, and of the property of the county therein, and the custody of the prisoners therein confined, and proceed to compel the delivery of the documents withheld, as prescribed by law."³

When Office of Sheriff Vacant.—"If, at the time when a new sheriff qualifies, and gives the security required by law, the office of the former sheriff is executed by his under sheriff, or by a coroner of the county, or a person specially authorized for that purpose, he must comply with the provisions of this title, and perform the duties thereby required of the former sheriff."⁴

Liability of Outgoing Sheriff.—The theory, under which the statute proceeds, is, that within ten days after the certificate of election, by an incoming sheriff, is served on the outgoing sheriff, all powers of the outgoing sheriff cease and determine, with the exception of completing the execution of process partially executed. Hence the power of the outgoing sheriff, to retain in his custody, or to arrest, any prisoners by virtue of any process, terminates, after the ten days have expired, from the service of the said certificate. Therefore, as to the prisoners who have not been actually transferred to the new sheriff, there is no officer who has the

¹ Code Civ. Pro., § 185.

³ Code Civ. Pro., § 188.

² Code Civ. Pro., § 187.

⁴ Code Civ. Pro., § 189.

right to restrain them of their liberty, and they are, in the eye of the law, at large. The new sheriff has no control over the prisoner, because he has never been transferred to him. The old sheriff cannot restrain the prisoner of his liberty, because, after the ten days, the old sheriff has lost all the powers appertaining to his office, so far as the prisoner is concerned.¹ But until the certificate is served by the incoming sheriff upon the outgoing sheriff, the powers of the latter, as to prisoners in his custody, remain unchanged.² The fact that he has turned over some prisoners to the incoming sheriff does not affect his powers as to the custody of prisoners not transferred.³ Hence the outgoing sheriff cannot be held liable for failure to deliver to his successor, or for the escape of a prisoner held upon execution against the person, who was in custody of such outgoing sheriff, confined within the jail limits, unless it is shown that a certificate, as prescribed by section 182 of the Code of Civil Procedure, has been served upon him, more than ten days before the commencement of the action.⁴

Delivery of Books and Papers, how Compelled.—Whenever the sheriff shall be removed from office, or the term for which he shall have been elected or appointed shall expire, he shall, on demand, deliver over to his successor all the books and papers in his custody as such officer, or in any way appertaining to his office. Every sheriff violating this provision shall be deemed guilty of a misdemeanor.⁵ If any sheriff shall refuse or neglect to deliver over any books or papers, such successor may make complaint thereof to any justice of the Supreme Court, or to the county judge of the county where the person so refusing shall reside, and if such officer be satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he shall grant an order, di-

¹ *Feerick v. Conner*, 60 How. Pr., 506; *Hempsted v. Weed*, 20 Johns., 73; *Hinds v. Doubleday*, 21 Wend., 223; *Partridge v. Westervelt*, 13 Wend., 504; *Ridgway v. Barnard*, 28 Barb., 613; *French v. Willett*, 10 Abb. Pr., 99.

² *Feerick v. Conner*, 60 How., 506; *Hinds v. Doubleday*, 21 Wend., 223; Code Civ. Pro., § 183.

³ *Smallman v. Lanes*, 2 Leonard, 54.

⁴ *Feerick v. Conner*, 60 How., 506.

⁵ 1 R. S. (5th ed.), 416, § 62; id. (6th ed.), 424, § 76; id. (7th ed.), 376, § 50; Penal Code, § 57.

recting the person so refusing, to show cause before him, within some short and reasonable time, why he should not be compelled to deliver the same.¹ At the time so appointed, or at any other time to which the matter may be adjourned, upon due proof being made of the service of the said order, said officer shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers, shall make affidavit before such officer, that he has truly delivered over to his successor, all such books and papers in his custody or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged.² If the person complained against shall not make such oath, and it shall appear that any books or papers are withheld, the officer before whom such proceedings shall be had, shall, by warrant, commit the person so withholding, to the jail of the county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law.³ In such case, if required by the complainant, such officer shall also issue his warrant, directed to any sheriff or constable, commanding them, in the day time, to search such places as shall be designated in such warrant, for such books and papers as belonged to the officer so removed, or whose term of office expired, in his official capacity, and which appertained to such office, and seize and bring them before the officer issuing such warrant.⁴ Upon any books and papers being brought before such officer, by virtue of such warrant, he shall inquire and examine whether the same appertain to the office, from which the sheriff so refusing to deliver, was removed or of which the term expired, and he shall cause the same to be delivered to the complainant.⁵ If any sheriff appointed or elected to office, shall die, or his office in any way become vacant, and any books or papers belonging or appertaining to such office, shall come to the hands of any person, the successor to such office may demand such books or papers,

¹ 1 R. S. (5th ed.), 417, § 63; id. (6th ed.), 425, § 77; id. (7th ed.), 376, § 51.

² 1 R. S. (5th ed.), 417, § 64; id. (6th ed.), 425, § 78; id. (7th ed.), 376, § 52.

³ 1 R. S. (5th ed.), 417, § 65; id. (6th ed.), 425, § 79; id. (7th ed.), 376, § 53.

⁴ 1 R. S. (5th ed.), 417, § 66; id. (6th ed.), 425, § 80; id. (7th ed.), 376, § 54.

⁵ 1 R. S. (5th ed.), 417, § 67; id. (6th ed.), 425, § 81; id. (7th ed.), 376, § 55.

from the person having the same in his possession, and on the same being withheld, an order may be obtained, and the person charged, may in like manner, make oath of the delivery of all such books and papers that ever came to his possession, and in case of omission to make such oath and to deliver up the books and papers so demanded, such person may be committed to jail and a search warrant may be issued, and the property seized by virtue thereof, may be delivered to the complainant, as before stated.¹

Where final judgment, in an action brought by the attorney-general against an usurper of the office of sheriff in any county, is rendered in favor of the person whom the plaintiff claims entitled to the office, such person may, after taking the oath of office, and giving an official bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded. If the defendant neglects or refuses to so deliver the books and papers demanded, the incoming sheriff must proceed to compel their delivery in the manner above detailed.²

SECTION III.

DISABILITIES OF THE SHERIFF.

As Attorney, etc.—A sheriff, under sheriff, deputy sheriff, sheriff's clerk, constable, coroner, crier, or attendant of a court, shall not, during his continuance in office, practice as an attorney or counsellor in any court.³

As Bail.—A sheriff, or any other person concerned in the process of the court, cannot be bail in an action, if excepted to.⁴

¹ 1 R. S. (5th ed.), 417, § 68; id. (6th ed.), 425, § 82; id. (7th ed.), 376, § 56.

² Code Civ. Pro., §§ 1951, 1952.

³ Code Civ. Pro., § 62.

⁴ *Bailey v. Warden*, 20 Johns., 129; *Coster v. Watson*, 15 id., 535; 1 *Dunl. Pr.*, 171; *Str.*, 890; *Doug.*, 466; 2 *Eos. & Pull.*, 150.

In the Execution of Process.—To allow an officer of the court to wield its process in his own favor, and for his own benefit, is contrary to well settled principles of public policy. Hence, neither the sheriff nor his deputy can do execution when the sheriff himself is a party, or beneficially interested; that he is only nominally a party, cannot affect the question. And if he owns the judgment upon which the final process issues, it is process in his favor, although he may not be a party to the record, and his name did not appear in the writ.¹ The danger of a perversion of the process of the court by an interested officer, is greater when the fact that the officer charged with its execution is the party in interest, is concealed, than when it is apparent upon the face of the process itself. But the sheriff, or any one of his deputies, may serve mesne or final process in an action, in which another of his deputies is a party or beneficially interested; although such action is for an act done by such deputy in his office.² No deputy can serve process in an action in which he is a party or interested.³ But there is no rule forbidding a deputy sheriff to purchase a judgment, while an execution thereon is in his hands for collection, still in force, but under which no levy has been made. In such case the sheriff, or another deputy, may proceed to collect the execution. A note given to a deputy sheriff, by a judgment debtor, for the amount of an execution, held by the former against the latter, after the sheriff has been attached for not returning it, and after the deputy has paid the judgment, and taken an assignment of it, is not void as being taken by the deputy by color of his office and for ease and favor, nor for want of legal consideration to uphold it.⁴

Not to Purchase at Execution Sale.—The sheriff, to whom an execution is directed, or the under sheriff or deputy

¹ *Carpenter v. Stilwell*, 11 N. Y., 61; *Sherman v. Boyce*, 15 Johns., 443; *Hammatt v. Wyman*, 9 Mass., 138; *Stevens v. Rowe*, 3 Denio, 327; *Mills v. Young*, 23 Wend., 314; *Stewart v. Magness*, 2 Cold. (Tenn.), 310; *Barker v. Remick*, 43 N. H., 235.

² *Commonwealth v. Moore*, 19 Pick. (Mass), 339; *Singletarg v. Carter*, 1 Bailey (S.C.), 467; *Wood v. Gilson*, 17 Ill., 218; but see *Dane v. Gilmore*, 51 Me., 544.

³ *Albany City Nat. Bank v. Kearney*, 9 Hun, 535.

⁴ *Sternbergh v. Provoost*, 13 Barb., 365.

sheriff, holding an execution, and conducting a sale of property by virtue thereof, shall not, directly, or indirectly, purchase any of the property at the sale. A purchase made by him, or to his use, is void.¹ This provision applies only to the sheriff and his deputies. It does not extend to a jailer or turnkey, unless he is also a deputy. And a deputy sheriff who is plaintiff in, or assignee of a judgment, may purchase under an execution thereon directed to his principal.²

Not to take Gratuity or Reward for an Appointment, etc.—No sheriff shall ask, receive, or agree to receive, any gratuity or reward, or any promise thereof, for appointing another person his deputy, on pain, on conviction, of forfeiting his office.³

When Guilty of Misdemeanor.—If a sheriff, or his deputy, knowingly, under pretense or color of official authority, does any act whereby another person is injured in his person, property or rights, he commits oppression, and is guilty of a misdemeanor.⁴ If he asks, receives, or agrees to receive, a fee or other compensation for his official service, either—1. In excess of the fee or compensation allowed to him by statute therefor; or, 2. Where no fee or compensation is allowed to him by statute therefor, he commits extortion, and is also guilty of a misdemeanor.⁵ If he executes any of the functions of the office of sheriff, without having taken and duly filed the required oath of office, or without having executed and duly filed the required security, he is guilty of a misdemeanor, and also forfeits his right to the office.⁶ But as to persons other than himself, his official acts in such case would be valid.⁷ If he asks or receives any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty, he is guilty of a misdemeanor.⁸ If he receives or asks any fee or compensation

¹ Code Civ. Pro., § 1387.

² Jackson v. Collins, 3 Cow., 89.

³ Penal Code, § 53.

⁴ Penal Code, § 556; § 119, as amended in 1882.

⁵ Penal Code, § 557; § 48.

⁶ Penal Code, § 42.

⁷ Penal Code, § 43.

⁸ Penal Code, § 49.

for any official service which he has not actually rendered, except in cases of charges for prospective costs, or of fees demandable in advance, in the cases allowed by law, he is guilty of a misdemeanor.¹ If he asks or receives any fee or compensation of any kind, for any service rendered or expense incurred, in procuring from the governor of this State a demand upon the executive authority of a State or territory of the United States, or of a foreign government, for the surrender of a fugitive from justice, or for any service rendered, or expense incurred, in procuring the surrender of such fugitive, or of conveying him to this State, or for detaining him therein, except upon an employment by the governor of this State, he is guilty of a misdemeanor.² If he, for any reward, consideration or gratuity, paid, or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments, or perform any of its duties, he is guilty of a misdemeanor; and, upon conviction, his office is forfeited, and himself forever disqualified from holding any office whatever under this State.³ Any deputation so wrongfully made is rendered void by a conviction for the offense; but any official act done by the deputy, before the conviction, is unaffected by it.⁴ If a sheriff willfully exercises any of the functions of his office, after his right to do so has ceased, he is guilty of a misdemeanor.⁵ If he receives any gratuity or reward, or any security, or promise of one, to procure, assist, connive at, or permit any prisoner in his custody to escape, whether such escape is attempted or not; or commits any unlawful act tending to hinder justice, he is guilty of a misdemeanor.⁶ If, in violation of his duty, he willfully neglects or refuses to receive a person into his official custody, or into a prison under his charge, he is guilty of a misdemeanor.⁷ If, hav-

¹ Penal Code, § 50.

² Penal Code, § 51; as amended in 1882, Code Crim. Pro., § 887.

³ Penal Code, § 54.

⁴ Penal Code, § 55.

⁵ Penal Code, § 56.

⁶ Penal Code, § 115.

⁷ Penal Code, § 116.

ing arrested a person upon a criminal charge, he willfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, he is guilty of a misdemeanor.¹ If, in executing a search warrant, he willfully exceeds his authority; or exercises it with unnecessary severity, he is guilty of a misdemeanor.²

When Guilty of Felony.—A sheriff or his deputy or a constable or other ministerial officer who, either: 1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office; or, 2. Fraudulently appropriates to his own use or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office, is guilty of felony.³ If, receiving money on behalf of, or for account of the people of this State, or for any department of the government of this State, or of any bureau or fund created by law, and in which the people of this State are directly or indirectly interested, or for or on account of any city, county, village or town; he, 1. Appropriate to his own use, or to the use of any person not entitled thereto, without authority of law, any money so received by him; or, 2. Knowingly keeps false accounts or makes a false entry or erasure in any account of, or relating to any money, so received by him; or, 3. Fraudulently alters, falsifies, conceals, destroys or obliterates any such account; or, 4. Willfully omits or refuses to pay over to the people of this State, or their officer or agent authorized by law to receive the same, or to such city, village, county, or town, or the proper officer or authority empowered to demand and receive the same, any money received by him, as such officer when it is his duty imposed by law to pay over, or account for, the same, he is guilty of a felony.⁴ If he allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large,

¹ Penal Code, § 118.

² Penal Code, § 120.

³ Penal Code, § 114.

⁴ Penal Code, § 470.

except as permitted by law, or connives at or assists such escape, or omits an act or duty whereby such escape is occasioned, or contributed to, or assisted ; he is, 1. If he corruptly and willfully allows, connives at, or assists the escape, guilty of a felony. 2. In any other case, guilty of a misdemeanor.¹

¹ Penal Code, § 89.

CHAPTER III.

OF THEIR DUTIES AS TO CRIMINAL PROCESS, AND HEREIN OF BAIL, CARE AND CUSTODY OF PRISONERS, AND EXECUTION OF CRIMINAL JUDGMENTS.

SECTION I.

OF WARRANTS OF ARREST IN CRIMINAL CASES.

1. *Warrants on Information Before Magistrates of the Commission of a Crime.*

Who may Issue; how Directed.—Officers having power to issue warrants for the arrest of persons charged with crime are denominated magistrates;¹ and the judges of the Supreme Court, or of the Superior Court or Court of Common Pleas, recorder, city judge or judge of a court of general sessions, in the city and county of New York; county judges, and a judge of a city court, have power to issue such warrants, directed generally to any peace officer in the State.² Any other magistrate, viz.: special county judges, justices of the peace, police and other special justices, appointed or elected in a city, village or town, and mayors and recorders of cities, other than recorder in the city and county of New York, may issue such warrants, directed generally to any peace officer in the county in which it is issued.³

Form and Contents of.—The warrant need not be in any prescribed form, but may be in substantially the form prescribed by section 151 of the Code of Criminal Procedure. It must be in the name of the people, and command the arrest of the defendant; and must specify the

¹ Code Crim. Pro., § 146.

³ Code Crim. Pro., §§ 147, 156.

² Code Crim. Pro., § 155.

name of the defendant, or if unknown to the magistrate issuing, the defendant may be designated therein by any name.¹ In case where the name of the defendant is unknown, the warrant must so describe the person intended, that the officer would know whom to arrest, and the person whose liberty was threatend might know whether he was bound to submit.² An arrest of a person, wrongly named, in the warrant, could not be justified except as stated above; and would subject the officer to an action for false imprisonment; if, however, the defendant was known by different names, and as well by the one in the warrant as another, the officer would be protected.³

The warrant must state an offense in respect to which the magistrate has authority to issue it, the time of issuing it, and the city, town or village where it is issued, and must be signed by the magistrate with his name of office.⁴ It should also direct the defendant to be brought before the magistrate issuing it, as no magistrate has power to commit to a subsequent day for examination, until defendant has been brought before him.⁵ A statement which indicates, with reasonable certainty, the crime sought to be charged, is sufficient.⁶ A warrant may be issued by any magistrate for any offense, but in the case of the issuing of a warrant by the magistrates authorized only to issue to officers in in the county, either the offense must be charged to have been committed in the same county where the warrant is issued, or the offender must then be in that county;⁷ where issued by the other magistrates above named, either the crime must have been committed in this State, or the offender be therein. The warrant should therefore show jurisdiction in the officer issuing. Where, however, the warrant does not on its face show want of jurisdiction, as to the person, and shows jurisdiction of the subject matter,

¹ Code Crim. Pro., § 152.

² *Miller v. Foley*, 28 Barb., 630.

³ *Griswold v. Sedgwick*, 1 Wend., 132; *id.*, 6 Cow., 456; *Gurnsey v. Lovell*, 9 Wend., 219; *Cooter v. Bronson*, 67 Barb., 444.

⁴ Code Crim. Pro., § 152.

⁵ Code Civ. Pro., § 165; Penal Code, §§ 118, 556; *Pratt v. Hill*, 16 Barb., 303.

⁶ *Pratt v. Bogardus*, 49 Barb., 89; *People v. McLeod*, 1 Hill, 377.

⁷ *Crocker on Sheriffs*, pp. 36, 39; *People v. Cassells*, 5 Hill, 164.

and is regular on its face, the officer is protected, even if he knew the facts that might avoid it.¹

When Offense Committed in another Town or City.—When the warrant is issued by a magistrate residing out of the town or city wherein the offense shall have been committed, and such offense is triable by a court of special sessions, it shall authorize the officer executing the warrant to carry the person charged before any magistrate, resident or being in the town or city wherein such offense shall have been committed, to be there proceeded against as provided in cases triable before courts of special sessions; but the magistrate issuing the warrant, shall not, by such authorization, lose jurisdiction in the premises.²

By Whom and where Executed.—It must be executed by a peace officer,³ which includes a sheriff, or his deputy, and an under sheriff;⁴ and a refusal or neglect to execute a warrant lawfully issued, is a misdemeanor.⁵

If directed generally to any peace officer in the State, it may be executed by any of those officers to whom it may be delivered, in any part of the State.⁶ If directed generally to any peace officer in the county in which it is issued, it may be executed in that county, by any of those officers to whom it is delivered; or if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of such other county, indorsed upon the warrant signed by him, with his name of office, and dated at the city, town or village where it is made, to the following effect: "This warrant may be executed in the county of *Monroe*" (or as the case may be).⁷ This indorsement cannot be made, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the hand-writing of the magistrate who issued it.⁸

¹ *Savacool v. Boughton*, 5 Wend., 171; *Webber v. Gay*, 24 Wend., 485; *People v. Warren*, 5 Hill, 440; *Mangold v. Thorpe*, 33 N. J. L. (4 Vr.), 131; *Lavender v. Hodgins*, 32 Ark., 763.

² Laws 1845, chap. 180, as amended by Laws 1847, chap. 455; R. S. (7th ed.), 846.

³ Code Crim. Pro., § 153.

⁴ Id., § 154.

⁵ Penal Code, §§ 154, 117, 122.

⁶ Code Crim. Pro., § 155.

⁷ Id., § 156.

⁸ Id., § 157

A warrant cannot be executed by a person to whom it is not directed and delivered.¹

City and County of New York.—The whole of the Hudson river southward of the northern boundary of the city of New York, and the whole of the bay between Staten Island and Long Island, shall be deemed within the jurisdiction of the city and county of New York, for all offenses cognizable in criminal courts of the city and county.²

Arrest under.—The warrant should be executed without delay, and the officer to whom it is delivered has no right to hold it for any purpose whatever, except to find the defendant, and for this purpose it will continue in force during the term of office of the magistrate issuing it.³ This officer, however, is not bound in every case, to start on the instant of receiving it, to execute it,⁴ and is responsible only for unreasonable neglect. He would be justifiable, especially in case of arrest, on charge of a misdemeanor, in choosing an appropriate time and place, if, in so doing, he did not endanger the escape of the defendant, or unreasonably delay the execution of the warrant.

While certain persons are exempt from arrest under a warrant in civil cases, no one is exempt from arrest on a warrant issued on information of the commission of crime. The officer must inform the defendant that he acts under the authority of the warrant, and he must also show the warrant, if required,⁵ and should notify the defendant of his intention to arrest him;⁶ he must then arrest the defendant by taking him into his custody, and this may be done, either by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.⁷ No manual touching of the body, or actual force, is necessary to constitute an arrest,⁸ but the mere causing him to voluntarily ap-

¹ Crocker on Sheriffs, 39, § 57; *Wales v. Clark*, 43, Conn., 183.

² 3 R. S. (5th ed.), 1040; 3 R. S. (6th ed.), 1045; 3 R. S. (7th ed.), 2575.

³ Barb. Crim. Law, 531, 532.

⁴ *Whitney v. Butterfield*, 13 Cal., 335.

⁵ Code Crim. Pro., § 173.

⁶ Code Crim. Pro., § 174; *Bellows v. Shannon*, 2 Hill, 86.

⁷ Code Crim. Pro., § 171.

⁸ Gold ads. Bissell, 1 Wend., 215 (see *Huntington v. Blaisdell*, 2 N. H., 318; *U. S. v. Benner*, 1 Bald., 239.)

pear before a magistrate is no arrest.¹ The defendant must not be subjected to any more restraint than is necessary for his arrest and detention,² and, of course, the particular circumstances of each case must control as to what force is needed. If, after being notified of the officer's intention to arrest him, the defendant either flee or forcibly resist, all necessary means may be used to make the arrest.³ Although it seems to be necessary, in all cases of arrest by warrant, that the officer should first inform the defendant that he acts under authority of the warrant, and show it, if required; and that unless the defendant has notice that the person attempting the arrest has authority, he may lawfully resist,⁴ still, there must necessarily be cases where too much formality in complying with these requirements cannot be observed, and the arrest may be simultaneous with the notification and production of authority. As an incident to the right to detain the defendant under a warrant, and to so do with safety to himself and others, the officer may, in any case, search the defendant, so far as to ascertain if he has any deadly weapons; this right, however, is necessarily governed by the circumstances of each case, such as the known character of the defendant, the nature of the crime charged, his conduct, etc., and must not be exercised without any fact or circumstance to justify it; especially where the arrest is not on a charge of felony.⁵ In short, an officer, in all his conduct towards a defendant under a warrant, before conviction, must bear in mind that the defendant is not a convict, but only charged with a crime, and that his only power and duty is to produce the defendant before a magistrate, and in so doing to do only what is actually necessary. The officer may require the aid of any person in the execution of the warrant,⁶ and a willful neglect or refusal to so aid is a misdemeanor,⁷ as is also the resisting, delaying or obstructing of an officer in the execution of a warrant, by

¹ Crocker on Sheriffs, 43, § 66.

² Code Crim. Pro., §§ 10, 172.

³ Code Crim. Pro., § 174; *Conraddy v. People*, 5 Park., 234.

⁴ *State v. Belk*, 76 N. C., 10; *Williams v. State*, 44 Ala., 4.

⁵ *Classon v. Morrison*, 47 (N. H.), 482.

⁶ Code Crim. Pro. § 169.

⁷ Penal Code, § 121.

force or violence, or an attempt so to do by threats.¹ When a sheriff or other public officer, authorized to execute process, has reason to apprehend that resistance is about to be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper, and any military company or companies in the county, armed and equipped, to assist him in overcoming the resistance, and if necessary in seizing, arresting and confining the resisters and their aiders and abettors, to be punished according to law.² The officer must certify to the court, from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be proceeded against for contempt.³ Every person commanded by a public officer to assist in the execution of process as above provided, is guilty of a misdemeanor for refusal or neglect to obey without lawful cause.⁴ In cases where the power of the county is not sufficient to enable the sheriff to execute process delivered to him, and such fact appear to the governor, he must, on the sheriff's application, order such a military force from any other county, or counties, as is necessary.⁵ When persons to the number of five or more, armed with dangerous weapons, or to the number of ten or more, whether armed or not, are assembled for the purpose of resisting the execution of a lawful process, such resisters may be treated as rioters, and dealt with as set forth in another chapter.⁶

If the crime charged in the warrant be a felony, the arrest may be made on any day, or night, or at any time of day, or night; but if it be a misdemeanor, unless by direction of the magistrate indorsed upon the warrant, the arrest cannot be made on Sunday, or at night.⁷

In the execution of a warrant, after notice of his authority and purpose, if refused admittance, the officer may break open an outer or inner door, or window of any building;⁸

¹ Id., §§ 46, 47, 124.

² Code Crim. Pro., § 102; See Laws 1878, chap. 275; Laws 1845, chap. 69.

³ Code Crim. Pro., § 103.

⁴ Code Crim. Pro., § 104.

⁵ Code Crim. Pro., § 105; *Coyle v. Horton*, 10 John., 85.

⁶ See chap. 2 ante.

⁷ Code Crim. Pro., § 170.

⁸ Code Crim. Pro., § 175.

and he may also break open such door or window, for the purpose of liberating a person, who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.¹

Disposition of Defendant.—The defendant must, in all cases, be taken before the magistrate without unnecessary delay,² and cannot be committed until brought before him;³ and an officer wilfully and wrongfully delaying to take him before a magistrate, having jurisdiction to take his examination, is guilty of a misdemeanor.⁴ If the crime charged be a felony, the defendant must be taken before the magistrate who issued the warrant, or if that magistrate be absent, or unable to act, before the nearest or most accessible magistrate in the same county; and at the same time the officer must deliver to the magistrate the warrant, with his return indorsed and subscribed by him.⁵ If the crime charged be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit him to bail, for his appearance before the magistrate named in the warrant.⁶ On taking bail the magistrate must certify that fact on the warrant, and deliver the warrant, and undertaking of bail, to the officer having charge of the defendant; the officer must then discharge the defendant from arrest, and, without delay, deliver the warrant and undertaking to the magistrate before whom the defendant is required to appear;⁷ but, if on being admitted to bail the defendant fail to give bail forthwith, the officer must take him before the magistrate who issued the warrant, or in case of that magistrate's absence, or inability to act, before the nearest or most accessible magistrate in the same county.⁸ In all cases where an officer takes a defendant before a magistrate in the same county, other than the one who issued the

¹ Code Crim. Pro., § 176; *State v. Smith*, 1 N. H., 346; *State v. Shaw*, 1 Root (Conn.), 184.

² Code Crim. Pro., § 165.

³ *Pratt v. Hill*, 16 Barb., 303.

⁴ Penal Code, §§ 118, 556.

⁵ Code Crim. Pro., §§ 158, 164.

⁶ Code Crim. Pro., § 159.

⁷ Code Crim. Pro., § 160.

⁸ Code Crim. Pro., § 161.

warrant, the absence or inability of the magistrate issuing the warrant, should be certified by the officer on the warrant,¹ unless the warrant in the cases before mentioned, authorize the officer to carry the defendant before another magistrate. When a defendant is brought before a magistrate for examination, a peace officer must, when required by such magistrate, take a message from the defendant to such counsel in the town or city as the defendant may name, without delay, and without fee,² in case the defendant desires counsel upon the examination. The examination must be completed at one session, unless the magistrate, for good cause shown, adjourn it. The adjournment cannot be for more than two days at each time unless by consent, or on motion of the defendant;³ and, in case of an adjournment, the magistrate must commit the defendant for examination, or discharge him from custody, upon his giving bail to appear during the examination, or upon the deposit of money as provided by section 586 of the Code of Criminal Procedure.⁴ Such commitment is made by indorsement, signed by the magistrate, on the warrant itself, to the following effect: "The within named A. B., having been brought before me under this warrant, is committed for examination, to the sheriff of the county of " (or, in the city and county of New York, "to the keeper of the city prison of the city of New York").⁵

Until the defendant has been let to bail by the magistrate, or discharged or committed after examination, where the examination is completed at one session, or committed for examination as above provided, he is in the custody of the officer arresting him; and such officer has a right to be present at the examination.⁶ If the magistrate, before whom the defendant is brought, has not authority to admit to bail, after examination or on a waiver of examination, in a case where bail is allowed, the officer should still retain the custody of the prisoner until he has been let to bail by

¹ The People v. Tuttle, 17 Wend., 211.

² Code. Crim. Pro., § 189; People v. Restell, 3 Hill, 289.

³ Code Crim. Pro., § 191.

⁴ Code Crim. Pro., § 192.

⁵ Code Crim. Pro., 193.

⁶ Code Crim. Pro., § 165.

a magistrate having authority, or committed. The defendant may, where the offense is bailable give bail at any hour of the day or night; and, in each of the cities of New York or Brooklyn, a police justice, to be designated, from time to time, by the mayors of those cities respectively, must be in attendance at the police headquarters of the city, from four o'clock in the afternoon of each day to ten o'clock the next morning, to take bail in proper cases if bail be offered.¹ The subject of bail and commitments will be treated of in their appropriate places. The officer should be careful not to let the defendant out of his custody where bail is given, unless it be a case in which he be entitled to bail, and the magistrate letting to bail has authority, otherwise he may be guilty of an escape.²

Retaking—Escape.—If a person arrested escape or be rescued, the person from whose custody he escapes, or was rescued, may immediately pursue and retake him, at any time, and in any place in the State;³ and, to retake such escaped or rescued person, shall have the same power to call on any citizen for aid,⁴ and to break open outer or inner doors, as in case of the original arrest;⁵ and a refusal or neglect to render aid, in retaking, is an offense.⁶ A person who aids, or assists in the escape, or in an attempt to escape, of a prisoner in the lawful custody of a sheriff, or other officer, is guilty of a misdemeanor, if the prisoner is held under arrest, commitment, or conviction for a misdemeanor, or upon a charge thereof; and of a felony, if the prisoner is held under an arrest, commitment or conviction for a felony, or upon a charge thereof;⁷ and a person who knowingly or willfully conceals or harbors, for the purpose of concealment, a person who has escaped, or is escaping from custody, is guilty of a felony if the prisoner is held upon a charge or conviction of felony, and of a misdemeanor, if the person is held upon a charge or conviction

¹ Code Crim. Pro., § 203.

² Clark v. Cleveland, 6 Hill, 344.

³ Code Crim. Pro., § 186.

⁴ Code Crim. Pro., § 163.

⁵ Code Crim. Pro., § 187.

⁶ Code Crim. Pro., § 163.

⁷ Penal Code, § 88; People v. Tompkins, 9 Johns., 70.

of misdemeanor.¹ The subject of escapes by negligence or misconduct of the officer, and their liabilities therefor, is more properly spoken of in another place.² The distinction between *voluntary* and *negligent* escapes, does not extend to criminal matter; and an officer may retake a prisoner whether he has permitted him to go at large improperly, or he has escaped without his knowledge or consent.³ Where the defendant is improperly discharged on bail, as before stated, he should be retaken, as if no bail had been given.

Return on.—The officer executing the warrant, should make return of his doings thereunder, which may be indorsed upon the warrant itself, or annexed to and properly referring to it, and is properly in the form of a certificate; it is not required, however, to be in any particular form, but must show what has been done under it, and be signed by the officer making the return. Where the warrant is executed by a deputy or under sheriff the sheriff may make the return,⁴ and where the deputy or under sheriff make such return, it must be made in the name of the sheriff: if made in the name of the deputy or under sheriff, it is void.⁵

After making his return on the warrant, the officer should deliver it to the magistrate before whom the defendant is required to appear, unless such magistrate is absent or unable to act, and the defendant is taken before another magistrate in the same county, in which case the warrant with the return thereto, together with an additional return of the fact of the absence or inability of the magistrate issuing the warrant, must be delivered to such other magistrate, and where the defendant is let to bail, in a county, other than that in which the warrant is returnable, the warrant, with the return thereto, and the undertaking given, must be delivered to the magistrate before whom the defendant is required to appear.⁶

¹ Penal Code, § 91.

² See chap. 6, section 2, *post*.

³ *Clark v. Cleaveland*, 6 Hill, 344.

⁴ *Crocker on Sheriffs*, 26, § 39.

⁵ *Simonds v. Catlin*, 2 Cal., 61; *Ditch v. Edwards*, Exr., 1 Scan. (Ill.), 127; *Rowley v. Howard*, 23 Cal., 401; *State v. Johnson*, 1 Hay (N. C.), 293; (as to Texas, see *Miller v. Alexander*, 13 Tex., 496; as to Mich., see *Collender v. Olcott*, 1 Mich., 344; as to Vermont, see *Eastman v. Curtis*, 4 Vt., 616)

⁶ Code Crim. Pro., §§ 106, 164; *The people v. Tuttle*, 17 Wend., 211.

the indictment has been sent or returned to another court), before the *court of Oyer and Terminer of that county* (or as the case may be), to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of *Albany* (or as the case may be, or in the city and county of New York, "to the keeper of the city prison of the city of New York").

"City (or town) of _____, the _____ day of _____, 18 _____, by order of the court."

E. F., Clerk."

Or G. W., district attorney of the county of _____."

If the indictment be for a misdemeanor, the warrant must be in a similar form, adding to the body thereof, a direction to the following effect: "or if he require it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer the indictment."² If the crime charged in the indictment be bailable, the court, upon directing the bench warrant to issue, may fix the amount of the bail; and in such case an indorsement must be made on the warrant, and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of _____ dollars."³

This warrant is served in the same manner as a warrant of arrest issued by a magistrate, except that when the defendant is arrested in another county, no indorsement by a magistrate in that county is needed;⁴ and where in case of misdemeanor the defendant is, at his request, brought before a magistrate of another county, for the purpose of giving bail, the same proceedings must be had thereon as in case of warrants of arrest issued by magistrates.⁵

If the defendant has given bail for his appearance, before the indictment, the court, to which the indictment is presented, or sent or removed for trial, may order the defendant to be committed either without bail, or unless he give bail in an increased amount, to be specified in the order,⁶ and if the defendant is present he must be committed accordingly,

¹ Code Crim. Pro., §§ 300, 301.

² Code Crim. Pro., § 302.

³ Code Crim. Pro., § 303.

⁴ Code Crim. Pro., § 304.

⁵ Code Crim. Pro., § 305.

⁶ Code Crim. Pro., § 306.

if not present a bench warrant must be issued, and proceeded upon as above.¹

A bench warrant, after indictment to bring the defendant up for arraignment, is executed by obeying the commands of the warrant; the officer is commanded in all cases to bring the defendant before the court where the indictment is triable, unless, in case of a misdemeanor, he gives bail, and unless the court has adjourned for the term, in which last case, the defendant must be delivered into custody as the warrant commands; the duty of the officer under the warrant then ceases; the defendant is then either kept in custody or let to bail, and the duties of sheriff and his officers in this regard will be found in another place.²

After Verdict—for Judgment—After a verdict of guilty, or where the defendant has pleaded guilty to the indictment, the court appoints a time for pronouncing judgment, when the defendant, in case of a conviction for a felony, must be personally present; in case of a misdemeanor, judgment may be pronounced in his absence.³ If he is not in custody (if he be in custody, he is brought before the court for judgment, by its direction), and does not appear for judgment, where such personal appearance is necessary, the court may direct the clerk to issue a bench warrant for his arrest,⁴ and the clerk, on the application of the district attorney, may, at any time after the order, issue a bench warrant into one or more counties, whether the court be sitting or not.⁵ The warrant must be substantially in the same form as in case of bench warrants, after indictment, for arraignment,⁶ except, of course, that instead of reciting that an indictment has been found, etc., it must recite, after its direction “to any sheriff,” etc., that “A. B., having been duly convicted in the *court of sessions of the county of Albany* (or as the case may be), of the crime of (designating it generally),” and instead of commanding him to be brought “before the court,” etc., “to answer the indictment,” it must command the officer “forthwith to arrest the above named A. B. and bring him before that court for judgment.”⁷

¹ Code Crim. Pro., § 307.

² Code Crim. Pro., § 473.

³ Code Crim. Pro., § 475.

⁴ Code Crim. Pro., § 476.

⁵ See *ante*.

⁶ Code Crim. Pro., § 477.

This warrant is also served the same as warrants issued by magistrates, but, when served in another county, need not be indorsed by a magistrate there.¹ The officer executing it must obey its commands by either bringing the defendant before the court out of which it issued, for judgment, or committing him as therein directed.

For Recommitment.—In cases where a defendant has given bail, or deposited money instead thereof, the court to which the committing magistrate returns the deposition and statement, or, in which an indictment or an appeal is pending, or to which a judgment on appeal has been remitted to be carried into effect, may, by an order entered upon its minutes, or, if the court be not in session, any judge thereof, may direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time he was admitted to bail, and his detention until legally discharged, in the following cases:

1. When he has, by failure to appear, incurred a forfeiture of his bail, or money deposited instead thereof.

2. When it satisfactorily appears that his bail, or either of them, are dead, or insufficient, or have removed from the State.

3. Upon an indictment being found, and the offense charged is either not bailable, or an increased amount of bail is required.² This order must recite, generally, the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal or policeman in this State, and committed to the officer to whose custody he was committed at the time he was admitted to bail, to be detained until legally discharged.³ The warrant in those cases consists of a certified copy of such order,⁴ and although not denominated a warrant in the Code, is so akin to a bench warrant, that it is spoken of here for convenience, and because it is the most appropriate place. The defendant may be arrested on such certified copy of the order, in any county, in the same manner as upon a warrant of arrest issued by a magistrate, except that when arrested in another

¹ Code Crim. Pro., § 478.

² Code Crim. Pro., §§ 599, 306.

³ Code Crim. Pro., § 600.

⁴ Id., § 601.

county no indorsement is necessary.¹ Where the order recites, as the ground upon which it is made, the defendant's failure to appear for judgment, the defendant must be committed as the order directs;² but where the order is made for any other cause, and the crime be bailable, the court may direct, in the order, that the defendant be admitted to bail, in a sum which the court may fix, and must specify in the order;³ and in such case the bail may be taken either by a magistrate designated by the court, or by any magistrate in the county when the charge is a misdemeanor, or a felony punishable with imprisonment not exceeding five years; and in case of any other charge by a judge of the Supreme Court, or any judge authorized to preside in a court having jurisdiction to try indictments, or by the court to which the depositions and statement of the committing magistrate have been sent, if the case be triable therein; or, if not, by the court to which, after indictment, it may be sent or removed for trial.⁴

3. *Coroner's Warrants.*

In case where a coroner's jury, summoned to inquire into the cause of the death or wounding of a person killed or dangerously wounded, find that such person was killed or wounded by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another, by criminal means, and the party committing the act be ascertained by the inquisition, and be not in custody, the coroner must issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged.⁵ This warrant must be in substantially the following form:

"County of *Albany* (or as the case may be).

"In the name of the people of the State of New York, to any peace officer in this State:

"An inquisition having been this day found by a coroner's jury, before me, stating that A. B. *has come to his death by*

¹ Code Crim. Pro., § 601.

² Code Crim. Pro., § 602.

³ Code Crim. Pro., § 603.

⁴ Code Crim. Pro., §§ 557, 558, 604.

⁵ Code Crim. Pro., § 780.

the act of C. D. by criminal means (or as the case may be, as found by the inquisition);

“You are, therefore, commanded forthwith to arrest the above named C. D., and take him before the nearest and most accessible magistrate in this county.

“Dated at the city of *Albany* (or as the case may be), the day of , 18 .

“E. F.,

“Coroner of the county of *Albany*”

(or as the case may be).¹

This warrant may be executed in any county, and needs no indorsement when the arrest is made in another county than where issued. Its execution is the same in all respects as in case of warrants issued by magistrates on information,² and the defendant, on arrest, must be brought before the nearest and most accessible magistrate in the county where the warrant is issued, for examination, pursuant to the commands of the warrant.³ Under the Revised Statutes, the defendant was brought before the coroner, and the examination was held before him, but it will be noticed, that, under the code, the examination is before a magistrate.

4. *Fugitives from Justice.*

From Another State or Territory.—It is provided by the constitution of the United States, that a person charged in any State, with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State, from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.⁴ And Congress has enacted, that whenever the executive authority of any State or territory demands any person as a fugitive from justice, of the executive authority of any State or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or territory, charging the person demanded

¹ Code Crim. Pro., § 781.

² Id., § 782.

³ Code Crim. Pro., § 781.

⁴ Cons. U. S., art. 4, § 2, subd., 2.

with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged.¹

The Code of Criminal Procedure also provides that the governor of this State must, on demand from the executive authority of the State or territory from which he fled, deliver up a person charged in any other State or territory of the United States, with treason, felony or other crime, who shall flee from justice, and be found in this State, to be removed to the State or territory having jurisdiction of the crime.² And also that a magistrate may issue a warrant, for the apprehension of a person so charged, who shall flee from justice, and be found within this State.³ The proceedings for the arrest and commitment by a magistrate are in all respects similar to those for the arrest and commitment of a person charged with the commission of a public offense in this State, except, that an exemplified copy of an indictment found, or other judicial proceeding had against him, in the State or territory where he is charged to have committed the offense, is received as evidence before the magistrate.⁴

The arrest on a magistrate's warrant may be made before any demand or requisition has been made for the surrender of the fugitive. Upon the arrest on a magistrate's warrant, if it appear on examination that the person charged has committed the crime alleged, the magistrate must commit him to the proper custody in his county, for such time, to be specified in the commitment as he deems reasonable, to

¹ U. S. Rev. Statutes, title 66, § 5278.

² Code Crim. Pro., § 827.

³ Id., § 828.

⁴ Code Crim. Pro., § 829.

enable the arrest of the fugitive under a warrant of the executive of this State, on a requisition from the State or territory where the offense was committed, unless he give bail, or until he be legally discharged.¹ The fugitive may be admitted to bail by a judge of the Supreme Court, for his appearance before him at a time specified, or for his surrender upon a warrant of the governor.² The magistrate upon the arrest, must give notice to the district attorney of the county,³ the district attorney must notify the executive authority of the State or territory, or the prosecuting attorney, or presiding judge of the criminal court of the city or county therein having jurisdiction of the offense,⁴ and unless before the expiration of the time named in the warrant of commitment or undertaking, he be arrested under a warrant of the governor of this State, the person arrested must be discharged.⁵ The magistrate must also return his proceedings to the next court of sessions, and such court must inquire into the cause of the arrest and detention, and if he be in custody, or the time for his arrest have not elapsed, may discharge him or order his bail canceled, or may continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time specified in the undertaking.⁶

Upon requisition to the governor of the State under the act of congress, and pursuant to the requirements of the constitution, aforesaid, the governor issues his warrant, under which the fugitive is arrested and secured, and if already in custody under a magistrate's commitment, is surrendered to the officer having the governor's warrant, and is surrendered to the duly authorized agent of the authority making the requisition, if appearing within six months from such arrest.

The governor's warrant runs to any sheriff, or other peace officer in the State, and is executed like any other warrant of arrest.

The right of another State or territory to demand the surrender of a fugitive, extends to all cases of the violation of the criminal law of such State or territory. Felonies and

¹ Code Crim. Pro., § 830.

² Code Crim. Pro., § 831.

³ Code Crim. Pro., § 832.

⁴ Code Crim. Pro., § 833.

⁵ Code Crim. Pro., § 834.

⁶ Code Crim. Pro., § 835.

misdemeanors, offenses by statute and at common law, are all within the constitutional provision, but where the crime charged is not indictable at common law in this State, the presumption will be that the courts of the other State agree with ours in the interpreting of the common law, and it must appear, by the affidavits presented to the executive, that the crime charged is an offense against the laws of the State, making the requisition.¹

The recitals in the governor's warrant are to be taken as *prima facie* true, and on a *habeas corpus*, the officer returning such warrant is justified, without producing the papers or evidence on which the governor acted ;² and when the fugitive is brought up on *habeas corpus*, the court will not inquire into his probable guilt, but only as to the legality of the process, and regularity of commitment.³ And it has been held that the governor has no right to inquire into the truth of the charge, nor to go outside of the papers, and that on *habeas corpus* the court cannot go behind the warrant.⁴

If the fugitive be in custody on a civil process, he cannot be surrendered on the governor's warrant, until he has satisfied the justice of the State in which he is held.⁵

From this State to Other States or Territories.—In cases where a person charged with crime has fled from this state into another state or territory, the sheriff or other officer pursuing such person, should present to the governor of this state, if such person has been indicted, a copy of such indictment, duly certified as such, under the hand and seal of the county clerk of the county where the indictment was found ; if no indictment has been had, then there must be presented before the governor the original affidavit or affidavits taken before a magistrate authorized to issue a warrant for the arrest of the person charged. Such affidavit or affidavits should be sufficient to authorize the issuing of a warrant thereon by such magistrate, and where such affidavits are taken before a justice of the peace or other local

¹ People ex rel. Lawrence v. Brady, 56 N. Y., 182.

² People ex rel. Draper v. Pinkerton, 77 N. Y., 245.

³ People ex rel. Lawrence v. Brady, 56 N. Y., 182.

⁴ People v. Pinkerton, 17 Hun, 199.

⁵ Ex parte Briscoe, 51 How. Pr., 422.

magistrate, they should be accompanied with a certificate of the clerk of the county, under his hand and official seal, certifying the official character and signature of such magistrate. If, on presentation of such papers, the governor finds it a proper case for a requisition, he will certify that the copy of the indictment or the affidavit is authentic, and in accordance with the laws of this State, and will make his requisition to the executive authority of such State or territory where the fugitive may be, requiring his arrest and delivery to such agent as shall be named and therein appointed by him to take the surrender of such fugitive and convey him into this State. The requisition is sealed with the State seal and attached to the papers on which it is granted. The agent thus appointed, who is usually the sheriff, or a sheriff's officer, from the county where the crime is charged to have been committed, presents the requisition and accompanying papers to the governor of the State or territory upon whom the requisition is made, and if the papers are satisfactory the fugitive is delivered to such agent under the warrant of such governor. The officer appointed agent usually has a duplicate of such warrant, and also should have a warrant from the proper court or magistrate in this State, in order that he may have authority to convey the fugitive from the other State or territory, after surrender to him, and when in this State, before the proper court or magistrate.

In procuring requisitions to other States, great care should be taken in having all the papers full and regular on their face. The certificate of the county clerk should be very full, and where certifying to the copy indictment, should certify that it is a copy of "the whole of the original" and "of all indorsements thereon." The affidavits should be full and specific, and should show that the crime charged is a crime under *the laws of our State*, in all cases where the offense is not indictable in other States or territories.

Fugitives from Foreign Country.—It is provided by act of congress that, whenever there is a treaty or convention for extradition, between the government of the United States and any foreign government, any judge of a court of record of general jurisdiction of any State may, upon com-

plaint, made under oath, charging any person found within the limits of any State, district, or territory, with having committed, within the jurisdiction of any such foreign government, any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such judge, to the end that the evidence of criminality may be heard and considered. And that if, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.¹

On the hearing, upon the return of such warrant, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper, or other document so offered, is authenticated in the manner required.² On the commitment of such fugitive, he is surrendered by the secretary of state on behalf of the United States government, upon proper requisition of the foreign government from which he fled, to a duly authorized agent on the part of such foreign government, who may take him to the territory of such foreign government,³ and, if he escape, he may be retaken the

¹ U. S. Rev. Stat., title 66, § 5270.

³ U. S. Rev. Stat., title 66, § 5272.

² U. S. Rev. Stat., title 66, § 5271.

same as if accused of any crime against the laws of that part of the United States where the escape is made.¹ When a person, committed as above, is not delivered up on requisition, and conveyed out of the United States within two calendar months after commitment, over and above the actual time required to so convey him out of the United States, by the readiest way, he may be discharged from custody by any State judge, as well as by any judge of the United States, on application of the person so committed, and proof of reasonable notice of the application on the secretary of state of the United States, unless sufficient cause is shown to the contrary.²

Fugitives to Foreign Countries.—In all cases, where a person charged with crime, flees out of the United States into the country of any foreign government with which the United States has a treaty for extradition, and the crime charged is one provided for by such treaty, such fugitive from justice may be brought back on requisition from the executive department of the United States, in substantially the same manner as in case of fugitives from one State or territory into another within the United States; but as such extradition is made by the government of the United States, on application made therefor in proper cases, it does not properly fall within the scope of this work. The United States may, however, appoint any person an agent to receive the surrender of such fugitive, and convey him into the jurisdiction from which he fled, in which case the agent is clothed with all the powers of a United States marshal within any district in the United States, for the purpose of conveying such fugitive to the place of his trial.³

5. *Peace Warrants.*

On information before any magistrate, that a person has threatened to commit a crime against the person or property of another, he must examine the complainant, and any witness produced, on oath, and reduce the examination to writing, and cause it to be subscribed by the parties making it, whereupon if there appears to be just reason

¹ U. S. Rev. Stat., title 66, § 5272.

³ U. S. Rev. Stat., title 66, § 5276.

² U. S. Rev. Stat., title 66, § 5273.

to fear the commission by the person complained of, of the crime threatened, the magistrate must issue a warrant, directed generally to any sheriff of the county, or any constable, marshal or policeman of the city or town, reciting the substance of the information, and commanding the officer to forthwith arrest the person complained of, and bring him before the magistrate.¹ The warrant is executed in the same manner as warrants on information of the commission of a crime. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto, and the evidence must be reduced to writing and subscribed by the witnesses, whereupon, if it appear that there is no just reason to fear the commission of the crime alleged to have been threatened, the person complained of must be discharged.² If, however, there be just reason to fear the commission of the crime, an undertaking may be required in a sum directed by the magistrate, not exceeding one thousand dollars, with one or more sufficient sureties, to abide the order of the next court of sessions of the county, and in the meantime to keep the peace toward the people of this State, and particularly towards the complainant.³ On giving such undertaking the person complained of must be discharged, but if such undertaking is not given, the magistrate must commit him to prison, specifying in the warrant the cause of commitment, the amount of security required and the omission to give the same. After such commitment, such person may be discharged by any two justices of the peace of the county, or police or special justices of the city, on giving the undertaking, for failure to give which he was committed.⁴

6. *In Bastardy Proceedings.*

Upon the examination by the magistrate to ascertain the father of the bastard, he must issue a warrant, directed to a peace officer of the county, commanding him, without delay, to apprehend the father and bring him before the justice, for the purpose of having an adjudication as to the filiation

¹ Code Crim. Pro., §§ 84, 85, 86.

³ Id., § 89.

² Code Crim. Pro., §§ 87, 88.

⁴ Code Crim. Pro., §§ 90, 91.

of the bastard.¹ If the defendant reside in another county than that in which the warrant was issued, the magistrate must indorse thereon a direction as to the sum in which the defendant must give security, and the officer must deliver the warrant to a justice of the peace or a police justice in the city or town in which the defendant resides or is found. The magistrate to whom it is presented on proof, under oath of the signature of the magistrate who issued the warrant, must then indorse a direction thereon, that it be served in the county in which he resides, and the defendant may be arrested in that county accordingly.² When the arrest is made in a county other than where the warrant issued, the defendant must be taken before the magistrate who indorsed the warrant, or before another magistrate of the same city or county, who may take the undertaking required, and discharge the defendant, and must indorse a certificate of discharge on the warrant and deliver the warrant to the officer, who must return the same to the magistrate who issued the warrant.³ If the defendant do not give security, the officer must take him before the magistrate who issued the warrant, unless such magistrate is absent or unable to act, in which case he must take him before the nearest or most accessible magistrate in the same county, and at the same time deliver to the magistrate the warrant, with a return of his proceedings thereunder indorsed thereon and subscribed by him.⁴ In case of the death, absence or vacating of office of a justice issuing the warrant, the Revised Statutes direct that the defendant be carried before some other justice of the same town, who shall have the same authority to proceed as the justice who issued the warrant.⁵ During the examination, and until discharged, defendant must remain in custody of the officer who arrested him.⁶

7. *Disorderly Persons.*

On complaint, on oath, to a justice of the peace or police justice of a city, village or town, or to the mayor, recorder,

¹ Code Civ. Pro., § 841.

² Code Civ. Pro., § 843.

³ Code Crim. Pro., §§ 844, 845.

⁴ Code Crim. Pro., §§ 846, 847.

⁵ 2 R. S. (5th ed.), 919, § 72; id. (6th ed.), 909, § 72; id. (7th ed.), 1954, § 71.

⁶ Code Civ. Pro., § 853.

city judge or judge of the general sessions of a city, against a person as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant and bring him before the magistrate for examination.¹

No provision is made for the execution of such warrant out of the county where issued, and the duties of the officer thereunder are plain.

8. In Proceedings Respecting Masters, Apprentices and Servants.

On complaint of a master, under oath, against an apprentice or servant, lawfully bound to service, of the willful absenting of such apprentice or servant from service, without the leave of the master, or refusal to serve according to his duty, or of his being guilty of a misdemeanor, or of ill behavior, before a justice of the peace or police justice in the county, or before the mayor, recorder or city judge of the city where he resides; in the absence of the apprentice or servant, and the proof of the facts to the satisfaction of the magistrate, he must issue a warrant, signed by him, with his name of office, to a peace officer of the county or city, commanding him to arrest the defendant and bring him before the magistrate forthwith, or at a specified time and place, to answer the complaint.² The warrant issued is executed by the peace officer by the arrest of the defendant, and taking him before the magistrate.³ The master of a clerk or apprentice, where money is paid or agreed for on binding him out, may make the same complaint against such clerk or apprentice, and the same proceedings, so far as the warrant and arrest are concerned, are had thereupon.⁴

6. Warrants in Other Cases.

For warrants in other criminal proceedings, or proceedings of a *quasi* criminal nature, see chapter V.

¹ Code Crim. Pro., § 900.

² Code Crim. Pro., §§ 927, 928; and see Laws 1871, chap. 934, § 4.

³ Code Crim. Pro., § 929.

⁴ Code Crim. Pro., § 937.

SECTION II.

OF SEARCH WARRANTS.

1. *Search Warrants Generally.*

A search warrant, as defined by the Code of Criminal Procedure, is "An order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate."¹ The term "writing" includes printing.²

When and by Whom Issued.—It may be issued upon either of the following grounds :

1. When the property was stolen or embezzled ; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be.

2. When it was used as the means of committing a felony ; in which case it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the crime, or of any other person in whose possession it may be.

3. When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered ; in which case it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.³

These are the cases in which search warrants are most commonly issued. The other cases in which such warrants may be issued, will be stated hereafter and treated separately.

A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the per-

¹ Code Crim. Pro., § 791.

³ Code Crim. Pro., § 791.

² Code Crim. Pro., § 956.

son, and particularly the property, and the place to be searched.¹ The magistrate must, before issuing the warrant, examine, on oath, the complainant, and any witnesses he may produce, and take their depositions, in writing, and cause them to be subscribed by the parties making them,² and such depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.³ If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant.⁴ The warrant may be issued by any magistrate, and what officers are denominated magistrates has been stated.⁵

Form and Contents of.—The Code of Criminal Procedure prescribes that the warrant must be in substantially the following form :

“County of Albany (or as the case may be).

“In the name of the people of the State of New York, to any peace officer in the county of Albany (or as the case may be):

“Proof, by affidavit, having been this day made before me, by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application, according to section 792 ; or, if the affidavits be not positive, ‘that there is probable cause for believing that’—stating the ground of the application in the same manner).

“You are, therefore, commanded, in the day-time (or ‘at any time of the day or night’ as the case may be, according to section 801), to make immediate search *on the person of* C. D. (or, ‘in the building situated,’ describing it or any other place to be searched with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity) : and if you find the same, or

¹ Code Crim. Pro., 793 ; Commonwealth v. Intox. Liquors, 13 All. (Mass.), 152 ; Bill of Rights, § 11.

² Code Crim. Pro., § 794.

³ Code Crim. Pro., § 795.

⁴ Code Crim. Pro., § 796.

⁵ See, *ante*, subd. 1, § 1.

any part thereof, to bring it forthwith before me, at (stating the place).

“Dated at the city of Albany (or as the case may be), the
day of 18 .

“E. F.

“Justice of the Peace of the city
(or town) of (or as the case may be).”

It must show that proof, by affidavit, has been made, showing the existence of the grounds upon which it is issued, and that there is probable cause for believing that they exist, and must state particularly what those grounds are, which must be such as authorize the issuing of the warrant; and must with reasonable particularity describe the property to be searched for, and the person, building or other place to be searched. It must particularly direct whether it shall be executed in the day time, or in the day or night. Unless the affidavits are positive that the property is on the person or in the place to be searched, it must contain a direction that it be served in the day-time; if they are positive, the warrant may direct it to be served at any time of the day or night.² The officer is not protected by his warrant in searching a place not particularly designated therein;³ nor in seizing any property not therein described, although if he seize goods corresponding with those described in the warrant, he is not liable for a mistake.⁴ If he wilfully exceeds his authority he is guilty of a misdemeanor.⁵

By Whom Served.—The warrant may be served by any peace officer to whom it is directed and delivered, and cannot be by any other person, except in aid of such officer when required by him, and in his presence.⁶

How Executed.—The officer may break open an outer or inner door or window of a building, or any part of a building, or anything therein, to execute the warrant; if, after

¹ Code Crim. Pro., § 797; *Thrush v. Bennet*, 57 Ala., 156; *Commonwealth v. Dana*, 2 Met. (Mass.), 329; *Dwinells v. Boynton*, 3 Allen (Mass.), 310.

² Code Crim. Pro., § 801.

³ *Johnson v. Comstock*, 14 Hun, 241; *Jones v. Fletcher*, 41 Me., 254; *Sanford v. Nicholas*, 13 Mass., 286; Constitution of U. S., Art. iv.

⁴ *Stone v. Dana*, 5 Met. (Mass.), 98.

⁵ Code Crim. Pro., § 812; Penal Code, § 120.

⁶ Code Crim. Pro., § 798.

notice of his authority and purpose, he be refused admittance; and may break open any outer or inner door or window of a building, for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. He is, however, guilty of a misdemeanor, if he exercise his authority with unnecessary severity.² It must be served in accordance with the directions therein contained, as to service in the day-time, or at any time of the day or night.³ If the officer find the property described in the warrant, he must, without delay, bring it before the magistrate issuing the warrant.⁴ It must be executed and returned within five days after its date, if issued in the city and county of New York, and within ten days if in any other county, otherwise it is void.⁵ Upon taking the property, the officer must give to the person from whom it was taken by him, or in whose possession it was found, and in the absence of any person, must leave in the place where he found the property, a receipt for the property taken, specifying it in detail.⁶ Procuring a search warrant to be issued and executed without probable cause and maliciously, is a misdemeanor, as is also the willful exceeding of his authority, or the exercise of his authority with unnecessary severity in the execution of a search warrant by a peace officer.⁷

Return.—Upon bringing the property before the magistrate, the officer must forthwith return to him the warrant, and with him must deliver an inventory in writing, of the property taken. Such inventory must have been made publicly, or in the presence of the person from whose possession the property was taken, and of the applicant for the warrant, if they be present, and must be verified by the affidavit of the officer taken before the magistrate, to the following effect :

“I. A. B., the officer by whom this warrant was ex-

¹ Code Crim. Pro., § 799.

² Code Crim. Pro., §§ 800, 812; Penal Code, § 120.

³ Code Crim. Pro., § 801.

⁴ Code Crim. Pro., §§ 791, 797

⁵ Code Crim. Pro., § 802.

⁶ Code Crim. Pro., § 803.

⁷ Code Crim. Pro., §§ 811, 812

ecuted, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.”¹

In addition to this return, or as a part of it, the officer should state from whom the property was taken, or where and in whose possession it was found. In case the property is not found, although the warrant as above stated becomes void unless executed within the time prescribed, the officer should return it to the magistrate with the statement indorsed thereon or annexed thereto, of his doings thereunder, and his inability to find the property described therein.

2. *In Certain Cases.*

To Obtain Books and Papers from an ex-Officer.—Any person having been removed from office, or whose term of office has expired, refusing on demand, to deliver over to his successor all the books and papers in his custody, appertaining to his office, is guilty of a misdemeanor,² and the Penal Code also includes with books and papers “the official seal.” Under the Revised Statutes, such successor may make complaint of a refusal or neglect so to do, to any justice of the Supreme Court, or county judge of the county where the person so refusing shall neglect, and an order to show cause may be issued, on the return of which, if the person so complained of do not make affidavit that he has truly delivered over to his successor all such books and papers in his custody or appertaining to his office, within his knowledge, and it appears that such books and papers are withheld, he shall be committed.³ If committed as above, the officer so committing shall also issue his warrant, if required by the complainant, directed to any sheriff or constable, commanding them in the day-time, to search such places as shall be designated in such warrant, for such books and papers as belonged to the officer so removed, or whose term of office expired, in his official capacity, and which appertained to such office, and seize and bring them before the officer issuing such warrant;⁴ and a search war-

¹ Code Crim. Pro., § 805.

² 1 R. S., 416, § 62; (6th ed.), 1 R. S., 424, § 76; Penal Code, § 57.

³ 1 R. S., 417, §§ 63, 64, 65; (6th ed.), 425, §§ 77, 78, 79.

⁴ *Ib.*, 417, § 66; (6th ed.), 425, § 80.

rant may issue in like manner in case any office shall become vacant in any way, and the books or papers belonging or appertaining to such office come into the hands of any person.¹

The warrant, in these cases, except that it is directed to and executed by a sheriff or constable, and need not describe the property in any more specific a manner than the statute directs, is the same as to form and contents, and is executed in the same manner as before stated in reference to search warrants generally.

For Gaming Devices, etc.—Under the statute, in regard to betting and gaming, it is provided that where an affidavit is filed with the magistrate or police justice of any town or city, before whom complaint is made of any offense against any provision of that act, stating that the affiant has reason to believe, and does believe, that the person so charged in such complaint has, upon his person, or at any other place named in such affidavit, any specified articles of personal property, or any gaming table, device or apparatus, or any lottery polices, public or private, the discovery of which might lead to establish the truth of such charge, the said magistrate or justice may, in his discretion, by warrant, command the officer, who is authorized to arrest the person so charged, to make diligent search for such property and table, device or apparatus, and, if found, to bring the same before such magistrate or justice.²

By the Penal Code, a person who is required or authorized to arrest any person for a violation of the provisions of chapter nine, entitled "Gaming," is also authorized and required to seize any table, cards, dice or other apparatus or article, suitable for gambling purposes, found in the possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person arrested is required to be taken;³ but there is nothing in the Code of Criminal Procedure corresponding in terms with the above provision of the Revised Statutes, although a search warrant might be issued under subdivision three of

¹ 1 R. S., 417, § 68; (6th ed.), 425, § 82.

² 2 R. S., 927, § 24; (6th ed.) 920, § 42.

³ Penal Code, § 345.

section 792¹ for the same purpose, and in like cases as under the Revised Statutes.

What has been said in regard to the form and execution of search warrants generally, applies to warrants issued under the statute.

For Obscene Prints.—"A person who sells, lends, gives away or offers to give away, or shows, or has in his possession, with intent to sell or give away, or to show, or advertizes or otherwise offers for loan, gift, sale or distribution, an obscene or indecent book, writing, paper, picture, drawing or photograph, or any article or instrument of indecent or immoral use, or who designs, copies, draws, photographs or otherwise prepares such a book, picture, drawing or other article, or writes or prints, or causes to be written or printed, a circular, advertisement or notice of any kind, or gives information orally, stating when, where, how or of whom, or by what means, such an indecent or obscene article or thing can be purchased or obtained, is guilty of a misdemeanor,"² and so also is "a person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend or give away, or has in his possession, with intent to sell, lend or give away, or advertizes or offers for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means, such an article or medicine can be purchased or obtained, or who manufactures any such article or medicine."³ And a person who knowingly or willfully receives any of the articles or things before specified, or any circular, book, pamphlet, advertisement or notice relating thereto, with intent to carry or convey, or knowingly or willfully conveys the same, by express, or in any other manner, except in the United States mail, is guilty of a misdemeanor.⁴

A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his

¹ See ante.

² Penal Code, § 317.

³ Penal Code, § 318.

⁴ Penal Code, § 319.

jurisdiction is offending against these provisions, supported by oath or affirmation, must issue a warrant, directed to the sheriff, or to any constable, marshal or police officer within the county, directing him to search for, seize, and take possession of any of the articles above specified, in the possession of the person against whom complaint is made.¹

An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, does not fall within the above provisions; nor does the supplying of such articles to such physicians, or by their direction, or prescription.²

The form and contents, and execution of warrants in these cases are the same as in the case of search warrants generally.

Habitual Criminals.—Where a person has been convicted and adjudged to be an habitual criminal, the person and premises of such person is liable at all times to search and examination by any magistrate, sheriff, constable or other officer, with or without a warrant,³ and where a warrant is issued for that purpose, no particular description of the property to be searched for is needed.

Other Search Warrants.—It is believed that all cases, where search warrants are allowed, falling properly under the head of criminal warrants, have been spoken of, and where in certain other cases search warrants are issued, they will be mentioned under the head of special proceedings.⁴

In some cases provided for before the enactment of the Code of Criminal Procedure, for the issuing of search warrants, it will be found that they now fall under one or the other of the three grounds upon which such warrants are allowed, under section 792 of said code.

SECTION III.

OF PROCEEDINGS AGAINST CORPORATIONS.

Summons Instead of Warrant.—Where information is made before a magistrate against a corporation, instead of

¹ Penal Code, § 320.

² Penal Code, § 321.

³ Code Crim. Pro., § 514.

⁴ See *post*.

a warrant, he issues a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge; the time to be not less than ten days, after the issuing of the summons.¹

Form of Summons.—The summons must be in substantially the following form :

“County of Albany (or as the case may be).

“In the name of the people of the State of New York, to the (naming the corporation):

“You are hereby summoned to appear before me, at (naming the place) or (specifying the day and hour), to answer a charge made against you, upon *the information of A. B.*, for (designating the offense, generally.)

“Dated at the city (or ‘town’) of _____, the _____ day of 18 _____.

“G. H., *Justice of the Peace*
(or as the case may be).”²

Service of Summons.—This summons must be served at least five days before the day of appearance fixed therein, and the service is made by showing the original and delivering a copy thereof to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof.³

Further Proceedings.—The charge made is investigated at the time named in the summons, in the same manner as in the case of a natural person, so far as applicable, and after hearing the proofs the magistrate must certify upon the depositions whether there is or is not sufficient cause to believe the corporation guilty of the offense charged, and return the depositions and certificate to the next Court of Oyer and Terminer, or court of sessions of the county, or city court having power to inquire into the offense by the intervention of a grand jury, at or before the opening of such court, on the first day; if the magistrate has certified that there is sufficient cause to believe the corporation guilty

¹ Code Crim. Pro., § 675.

² Id., § 676.

³ Code Crim. Pro., § 677.

of the offense charged, the grand jury may proceed thereon in the same manner as in the case of a natural person.¹

Where a fine is imposed upon a corporation, on conviction, it may be collected by virtue of an order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action.²

SECTION IV.

OF COMMITMENTS.

1. *On Peace Warrants.*

Where, on the arrest of a person, charged with having threatened to commit a crime, such person, after taking of the testimony, is required to enter into an undertaking, and such undertaking is not given, the magistrate must commit him to prison; specifying, in the warrant, the cause of commitment, the amount of security required, and the omission to give the same;³ and a person so committed may be discharged by any two justices of the peace of the county, or police or special justices of the city, upon giving the security.⁴ This commitment should be to the county jail of the county where made.

2. *On arrests upon Information of the Commission of a Crime.*

On Adjournment.—As we have before seen, no commitment can be made until the defendant is actually brought before the magistrate. The examination may be adjourned for cause, but not more than two days, unless on defendant's motion, or by his consent. On such adjournment, if bail be not given, or money deposited, as provided, in lieu thereof, the magistrate must commit the defendant for examination. Such commitment is made by an indorsement on the warrant of arrest, to the following effect: "The

¹ Code Crim. Pro., § 678, 679, 680.

² Code Crim. Pro., § 682.

³ Code Crim. Pro., § 90; *Bradstreet v. Ferguson*, 23 Wend., 638.

⁴ Code Crim. Pro., § 91.

within named A. B., having been brought before me under this warrant, is committed for examination to the sheriff of the county of _____, or, in the city and county of New York, "to the keeper of the city prison of the city of New York."¹

After Examination.—If the defendant is held, after examination, the magistrate must indorse, on the depositions and statement taken upon the examination, an order, signed by him, to the following effect: "It appearing to me by the within depositions (and statement, if any), that the crime therein mentioned (or any other crime according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same," and, if the crime be not bailable, he must add the following words, or words to the same effect, "and that he be committed to the sheriff of the county of _____," (or, in the city and county of New York, "to the keeper of the city prison of the city of New York"). If, however, the crime be bailable, and the defendant be admitted to bail, but bail is not given, the following words, or words to the same effect, must be added to the indorsement, instead of those last-above stated, to wit: "And that he be admitted to bail in the sum of _____, and be committed to the sheriff of the county of _____," (or, in the city and county of New York, "to the keeper of the city prison of the city of New York"), until he give such bail."² If the magistrate order the defendant to be committed as above, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed; or, if that officer be not present, to a peace officer, who must immediately deliver the defendant into the proper custody, together with the commitment.

The commitment must be to the following effect:

"County of *Albany* (or as the case may be).

"In the name of the people of the State of New York:

"To the sheriff of the county of *Albany* (or as the case

¹ Code Crim. Pro., § 193.

² Code Crim. Pro., §§ 208, 209, 212.

may be) (or, in the city and county of New York, 'to the keeper of the city prison of the city of New York'):

"An order, having this day been made by me, that A. B. be held to answer to the court of _____, upon a charge of (stating briefly the nature of the crime), you are commanded to receive him into your custody and detain him until he be legally discharged.

Dated at *the city of Albany* (or as the case may be), this
day of _____, 18 .

C. D.,

Justice of the Peace.

(or as the case may be.)¹

In States, other than New York, where the form of the commitment is not prescribed by statute, it should appear on the face of the same, what the charge against the defendant is, and should generally recite the complaint and proceedings, showing authority to detain.

3. *Witnesses.*

The magistrate may take from each material witness examined before him, on the part of the people, upon such examination aforesaid, an undertaking for his appearance at the court to which the depositions and statement are sent, and if satisfied by proof on oath, that such witness will not appear and testify, unless security be required, he may order an undertaking to be given, and for refusal to comply with such order must commit the witness until he comply or be legally discharged.² Such witness may, however, be conditionally examined, forthwith, if, by his examination or the examination of any other person, on oath, it satisfactorily appears that he is unable to procure surties.³ Such conditional examination, however, is not provided for in the case of the prosecutor, or an accomplice in the commission of the crime charged.⁴ The commitment of a witness, should be in substantially the same form as the commitment of the defendant, and should recite the order to give an undertaking, and the refusal to comply therewith, so that it appear for what cause the commitment is made;

¹ Code Crim. Pro., §§ 213, 214.

² Code Crim. Pro., §§ 215, 216, 218.

³ Code Crim. Pro., § 219.

⁴ Id., § 220.

and it should command the officer, to whom it is directed, to receive the person so committed into his custody, and detain him until he be legally discharged.

Infants and married women may be required to give security under the foregoing provisions.¹

4. *To House of Detention.*

The boards of supervisors of each of the counties in this State, except in the county of Kings, and city and county of New York, are authorized to procure suitable places, other than common jails, for the safe and proper care and keeping of women and children charged with offenses, and held for trial, and all persons detained as witnesses; such place to be termed houses of detention; and whenever such place is provided in any county, in accordance therewith, any magistrate in such county, authorized to commit persons charged with offenses and held for trial, shall direct, on his order of committal—in case the person charged is a woman or girl, or a boy under sixteen years of age—that such person be placed in the house of detention, in his county, instead of the jail; and every person held as a witness in such county shall be placed in such house of detention.

These provisions do not, however, apply to the committal of persons charged with crimes punishable by death, or imprisonment in States prison, for a term exceeding five years, or charged with the second offense.²

5. *After Indictment.*

A bench warrant is, in itself, a commitment, when issued upon an indictment, in case no bail is given, and the court issuing it has adjourned for the term; and such warrant directs the defendant to be delivered to the proper custody.³

On Order of Court.—The court to which the indictment is presented, or sent, or removed for trial, if the defendant has given bail for his appearance to answer the charge, may order the defendant to be committed to actual custody, either without bail, or unless he give bail in an increased amount;

¹ Id., § 217.

² Laws 1875, chap. 464.

³ Code Crim. Pro., §§ 300, 301.

to be specified in the order;¹ and if the defendant be present when the order is made, he must be forthwith committed accordingly. Where he is not present when such order is made, he may be so committed on being brought up on a bench warrant.² In this case, the order being made in court, no commitment or further authority is necessary, as the order is a part of the record of the court,³ and no provision is made for a warrant of commitment by the Code of Criminal Procedure. A certified copy of the order may be procured by the officer, should he desire it, which will take the place of a commitment.

Indicted in Wrong State or County.—When it appears on the trial of the indictment, that the crime was committed out of the jurisdiction of this State, the court may order the defendant to be detained for a reasonable time specified in the order, until the district attorney can communicate with the proper authority of the State, territory or district where the crime was committed. And when it appears that the crime was committed within the exclusive jurisdiction of another county of this State, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the crime be a misdemeanor only, he may be admitted to bail.⁴ In either of these cases the commitment consists of the order made in open court, and no other authority is needed for the detention of the defendant.

On Appearing for Trial.—When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court; and he must be committed and held accordingly.⁵ As in other cases, where the defendant is committed by order of the court, made in open court, no further commitment than the order itself is needed.

Order for Re-submission.—When the indictment is set

¹ Code Crim. Pro., § 306.

² Code Crim. Pro., § 307.

³ *State v. Heathman, Wright* (Ohio), 691.

⁴ Code Crim. Pro., §§ 403, 404.

⁵ Code Crim. Pro., § 422.

aside on motion, and the court directs that the case be re-submitted, the defendant, if already in custody, must so remain.¹ In such case the order for re-submission operates as a commitment, and where the defendant has given bail or deposited money instead, the bail or money is answerable for his appearance to answer a new indictment. So too, in a case where the jury is discharged on the trial, because the facts as charged in the indictment do not constitute a crime, and in the opinion of the court a new indictment can be framed, and the court directs that the case be re-submitted to the same, or another grand jury.²

6. *On Verdict.*

Where, on a general verdict, a judgment of acquittal be given, and the acquittal is for a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order the detention of the defendant, to the end that a new indictment may be preferred.³

If a general verdict be rendered against the defendant, or a special verdict be given, he must be remanded, if in custody, or if on bail, he may be committed to the proper officer of the county, to await the judgment of the court upon the verdict.⁴

If Insane.—If the defense is insanity, and the defendant be acquitted on that ground, if he be in custody, and the court deem his discharge dangerous to the public peace or safety, he must, by order, be committed to the State lunatic asylum until he becomes sane.⁵ In all these cases, unless it be the last, nothing further than the order made in court is necessary for the commitment. In the case of commitment to a lunatic asylum, a certified copy of the record of the court, including the order of commitment, would be proper, if not required for the protection of the authorities of the asylum, as well as of the officer conducting the defendant there.

7. *On Arrest of Judgment.*

When judgment is arrested, if there is reasonable ground

¹ Code Crim. Pro., §§ 317, 318.

⁴ Code Crim. Pro., § 453.

² Code Crim. Pro., §§ 408, 409.

⁵ Code Crim. Pro., § 454.

³ Code Crim. Pro., § 452.

to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the court may order him to be re-committed, or admitted to bail anew, to answer the new indictment; and if there is reasonable ground to believe him guilty of another crime he must be committed or held to answer therefor.¹ This order is made in open court, and no other commitment is needed.

8. *After Judgment.*

After judgment has been pronounced and entered, in every case, except judgment of death, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary for its execution.²

Where the judgment is imprisonment, or a fine, and imprisonment until it be paid, the defendant must forthwith be committed to the proper officer, and by him detained, until the judgment be complied with. If the judgment is imprisonment in the county jail, or a fine, and imprisonment until paid, the judgment must be executed by the sheriff of the county. In all other cases, where the sentence is imprisonment, the sheriff of the county must deliver the defendant to the proper officer, in execution of the judgment, and must, in such case, deliver a copy of the entry of the judgment upon the minutes of the court, together with the body of the defendant, to the keeper of the prison in which the defendant is to be imprisoned.³ And the sheriff or his deputy, while conveying the defendant to the proper prison, in execution of a judgment of imprisonment, has the same authority to require the assistance of any citizen of this State in securing the defendant, and retaking him if he escape, as if the sheriff were in his own county; and every person who refuses or neglects to assist the sheriff, when so required, is punishable, as if the sheriff were in his own county.⁴

9. *On Surrender by Bail.*

When a surety on an undertaking surrenders the defend-

¹ Code Crim. Pro., § 470.

² Code Crim. Pro., §§ 487, 488, 489.

³ Code Crim. Pro., § 486.

⁴ Code Crim. Pro., § 490.

ant in his exoneration, or the defendant himself surrenders, to the officer to whose custody he was committed at the time of giving bail, a certified copy of the undertaking of the bail delivered to the officer, operates as a commitment, and the officer must detain the defendant thereon as upon a commitment, and, by a certificate in writing, acknowledge the surrender.¹

10. *In Bastardy Proceedings.*

Upon the making of an order of filiation in these proceedings, if the defendant fails to give the undertaking required, the magistrates making the order, or either of them, must commit him, by warrant, to the county jail, or, in the city of New York, to the city prison of that city, until he be discharged by the court of sessions of the county, or deliver the undertaking required;² and when so committed he must be actually confined.³

Committing Mother.—The magistrate issuing the warrant, or the magistrates making the examination may, on the refusal of the mother of a bastard, chargeable to a county, city or town, or a woman pregnant of a child likely to be born such, to disclose the name of the father of the bastard, upon being so required, commit her, at the expiration of one month from her delivery, if sufficiently recovered, to the county jail, or, if in the city of New York, to the city prison of that city, by a warrant setting forth the cause thereof, until she disclose the name of the father.⁴

Where an order has been made directing the mother of such bastard, as aforesaid, to support it, and such order, after service on her, is not complied with, she must be committed by the magistrates making the order—any two magistrates of the county or city where she is—to the county jail, or, in the city of New York, to the city prison of that city, until she comply with the order, or be discharged by giving an undertaking for her appearance at the next court of sessions of the county.⁵

By Court of Sessions.—On the hearing of an appeal, if

¹ Code Crim. Pro., § 590.

⁴ Code Crim. Pro., § 856.

² Code Crim. Pro., § 852.

⁵ Code Crim. Pro., §§ 857, 858.

³ Code Crim. Pro., § 853.

the order of filiation be affirmed, and the defendant required to enter into an undertaking, on failure to give the undertaking required, he must be committed to the county jail, or, in the city of New York, to the city prison of that city until he do so, or be discharged by the court.¹ And where the mother is committed for failure to comply with an order directing her to support the bastard, or gives an undertaking for her appearance before the court of sessions, upon the making of such an order, if the court of sessions affirm the order and require an undertaking, she must, in default of such undertaking, be committed to the county jail, or, in the city of New York, to the city prison of that city until she do so, or be discharged by the court.²

Court of Sessions only can Discharge.—A person committed to prison, charged as the father of a bastard, or of a child likely to be born a bastard, or a mother of a bastard committed for not giving an undertaking to support the bastard, or to indemnify the public, can be discharged from imprisonment, only by the court of sessions of the county.³

11. *Vagrants.*

Upon conviction on the charge of vagrancy, the record of conviction, which consists of a certificate,⁴ must be immediately filed in the county clerk's office; and the magistrate, before whom the conviction is had, issues a warrant of commitment, signed by him with his name of office, committing such vagrant, if a proper object for such relief, and not a notorious offender, and not a child under sixteen years of age, or a female between the age of fifteen and thirty, where the act of vagrancy is habitual drunkenness or common prostitution, or a non-resident of the State, to the county poor-house, if there be one, or to the alms-house or poor-house of the city, village or town, for not exceeding six months, at hard labor; or, if not a proper person to be so committed, he must be committed for a like term to the county jail, or, in the city of New York, to the city prison.

¹ Code Crim. Pro., §§ 867, 868.

² Code Crim. Pro., §§ 870, 872.

³ Code Crim. Pro., §§ 880, 877.

⁴ Code Crim. Pro., § 891.

or penitentiary of that city ; or, in the county of Kings, to the penitentiary of that county.¹

Children.—It is not lawful to commit any child under sixteen years of age as a vagrant to any jail, county poor-house or alms-house, except such child being between the age of five and fourteen, and a truant, under the provisions of the Code of Criminal Procedure, has no parent, guardian or master, or none can be found, or the parent, guardian or master refuse or neglect, within a reasonable time, to enter into the engagement and give the security required of them in such case, and there is no place provided for the reception of such child, in which case he shall be committed to the alms-house of the county ;² and except where a child be found begging for alms, such child, under the provisions of the Code of Criminal Procedure must be committed to the county poor-house, or other place provided for the support of the poor.³

Women.—Females convicted of being vagrants, the act of vagrancy being habitual drunkenness, or common prostitution, and being between the age of fifteen and thirty, convicted in any county other than Kings and New York, may be committed to the house of refuge for women ;⁴ and women under sixteen for acts of vagrancy consisting of prostitution, convicted in either the fourth, fifth, sixth, seventh or eighth judicial districts, may be committed to the Western House of Refuge for juvenile delinquents.⁵ It appears that the commitment to the house of refuge for women is executed under the direction of the managers of that institution.

Tramps.—Tramps are to be committed to the nearest penitentiary for not more than six months ; and any act of vagrancy, by any person, not a resident of the State, constitutes such person a tramp.⁶

¹ Code Crim. Pro., § 892; see 3 R. S. (7th ed.), 1896; 2 id. (6th ed.), 837; id. (5th ed.), 880.

² Laws 1879, chap. 240; 3 R. S. (7th ed.), 1881; Code Crim. Pro., § 887, subd. 8, § 888; see Laws 1875, chap. 173; (3 R. S. [7th ed.], 1880; id. [7th ed.], 2655, 2659).

³ Code Crim. Pro., § 893.

⁴ Laws 1881, chap. 187 (3 R. S. [7th ed.], 2664).

⁵ Laws 1857, chap. 228 (3 R. S. [7th ed.], 2662).

⁶ Laws 1880, chap. 176 (3 R. S., [7th ed.], 1898).

12. *Disorderly Persons.*

A defendant convicted of being a disorderly person, must be committed to the county jail, by warrant signed by the magistrate with his name of office, or in the city of New York, to the city prison or penitentiary of that city, for not exceeding six months, at hard labor, or until he give the required security; the record of conviction, which consists of a certificate, should be immediately filed in the county clerk's office.¹ If, however, such disorderly person be under sixteen years of age, the commitment must not be to the county jail, but to some reformatory or other institution, as provided for in the case of juvenile delinquents.² Females under sixteen, may be sent to the Western House of Refuge, if in fourth, fifth, sixth, seventh or eighth judicial districts.³

Upon examination into each case of confinement, on conviction for being a disorderly person, by the court of sessions, as is required by law, such court may, after such inquiry, order such person to be kept in the county jail, or in the city of New York, in the city prison or penitentiary of that city, for a term not exceeding six months, at hard labor.⁴ The Revised Statutes also provide that during any part of the time of such imprisonment, not exceeding thirty days, such offender may be directed to be kept on bread and water only, but it is supposed that the provisions of the Criminal Code covering this matter have abrogated such parts of the statute as differ from it.

13. *Juvenile Delinquents.*

Where a person between sixteen and twenty-one years of age, is convicted of a felony, or where the term of imprisonment of a male convict for a felony is fixed by the trial court at three years or less, the court may direct the convict to be imprisoned in a county penitentiary instead of a State prison, if there is a county penitentiary within the judicial

¹ Code Crim. Pro., § 903.

² Laws 1879, chap. 240 (3 R. S., [7th ed.], 1881).; See Laws 1875, chap. 173; 3 R. S. (7th ed.), 1881; Penal Code, § 291.

³ Laws 1875, chap. 228 (3 R. S., [7th ed.], 2663).

⁴ Code Crim. Pro., §§ 909, 911; R. S. (7th ed.), 1949.

district in which the trial is had.¹ A male between the ages of sixteen and thirty, convicted of a crime, may, in the discretion of the court, be sentenced to imprisonment in the New York State Reformatory at Elmira.²

Where a person under sixteen years of age is convicted of a crime, the court may, instead of sentencing to a State prison or penitentiary, direct confinement in a house of refuge, under the provisions of the statute relating thereto, and when the conviction is had in the first, second or third judicial districts, the confinement must be in the house of refuge, established by the managers of the society, for the reformation of juvenile delinquents in the city of New York; in any other district, in the western house of refuge, for juvenile delinquents.³

And where a person under twelve years of age is convicted of a misdemeanor, the court in its discretion, may, instead of fine or imprisonment, direct such child be placed in charge of any suitable person willing to receive him, and be thereafter, until majority or for a shorter term, subjected to such discipline and control of the person receiving him, as a parent or guardian may exercise over a minor.⁴ The court sentencing must ascertain the age of a juvenile delinquent, and insert it in the commitment.⁵

14. *Women, House of Refuge for.*

All females between the ages of fifteen and thirty years, sentenced in any county but New York and Kings, on a conviction for petit larceny, habitual drunkenness, common prostitution, or frequenters of disorderly houses, or houses of prostitution, may be sentenced and committed to the house of refuge for women, upon which the magistrate or court sentencing, must notify the superintendent of such house of refuge, and the board of managers thereof, will attend to the conveying of such women from the place of conviction.⁶

¹ Penal Code, § 699.

² Id., § 700.

³ Id., § 701; Laws 1875, chap. 228 (3 R. S., [7th ed.], 2662); 3 R. S. (7th ed.), 2537; 3 R. S. (6th ed.), 990; 3 R. S. (5th ed.), 987.

⁴ Penal Code, § 713.

⁵ 3 R. S., (7th ed.), 2661; 3 R. S., (6th ed.), 991; 3 R. S., (5th ed.), 987.

⁶ Laws 1881, chap. 187; 3 R. S., (7th ed.), 2664.

Convicted of Felony.—A female convicted of a felony punishable by imprisonment, must be sentenced to a county penitentiary, instead of a State prison, and if there is none in the county where she is convicted, then to the nearest one.¹

15. *County Jail—Penitentiary—State Prison.*

Where the term of imprisonment is less than a year, it must be in the county jail, or place designated to be used as such, except when otherwise specially prescribed by statute, as in the case of children;² where the imprisonment is for one year, the same may be either in a county jail, or in a penitentiary or State prison.³ Where the imprisonment shall, by the sentence, be for more than a year, the same shall be in a State prison at hard labor.⁴ This, however, does not apply to cases where special provision is made by statute, for the punishment of particular offenses, or offenders, nor to female convicts and juvenile delinquents. In cases of misdemeanors, where no other punishment is specially prescribed by the Penal Code, or by any other statutory provision, the punishment shall be by imprisonment in a penitentiary, or county jail, for not more than one year, or by fine of not more than \$500, or by both;⁵ but, as we have already seen, if the punishment is less than a year, the imprisonment must be in the county jail.

16. *Fugitives.*

The proceedings in regard to the commitment of fugitives are similar to those upon the arrest and commitment of persons charged with a crime committed in this State.⁶ The commitment is for a time specified in the warrant of commitment, which is deemed reasonable, to enable the arrest of the fugitive under a warrant issued after a requisition.⁶

17. *Search of Person.*

Incident to the commitment, any magistrate who shall commit any person charged with any offense, to prison, or

¹ Penal Code, § 698.

² Penal Code, § 702.

³ Penal Code, § 703.

⁴ Penal Code, § 704.

⁵ Penal Code, § 15.

⁶ Code Crim. Pro., §§ 829, 830.

by whom any vagrant or disorderly person shall be committed, may cause such person to be searched for the purpose of discovering any property, and, if any property be found, it may be taken and applied to the support of such person while in confinement.¹

18. *Commitment of Witness for Perjury.*

Where it appears probable to a court of record that a person, who has testified before it in an action or proceeding, has committed perjury in his testimony, the court may immediately commit him, by order or process, to prison, or take bail for his appearance and answer to an indictment for perjury.²

SECTION VI

OF BAIL.

1. *Defined.*

“The taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant according to the terms of the undertaking, or that the bail will pay to the people of this State a specified sum.”³

2. *Deposit, Instead of.*

The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the county treasurer, of the county in which he is held to answer, the sum mentioned in the order; and upon delivering to the officer in whose custody he is, a certificate of the deposit, he must be discharged from custody.⁴

Deposit after Giving Bail.—If the defendant have given bail, he may, at any time before the forfeiture of the undertaking, in like manner, deposit the sum mentioned in the undertaking, and, upon the deposit being made, the bail is exonerated.⁵

¹ 3 R. S. (7th ed.), 2576; id. (6th ed.), 1045; id. (5th ed.), 1041.

² Penal Code, § 102.

³ Code Crim. Pro., § 551.

⁴ Code Crim. Pro., § 586.

⁵ Code Crim. Pro., § 587.

Bail after Deposit.—If money be deposited, as provided above, bail may be given in the same manner as if it had been originally given upon the order for admission to bail, at any time before the forfeiture of the deposit. The court or magistrate, before whom the bail is taken, must thereupon direct, in the order of allowance, that the money deposited be refunded by the county treasurer to the defendant, and it must be refunded accordingly.¹

3. *To Keep the Peace.*

On arrest upon a peace warrant, security to keep the peace is required by the magistrate before whom the defendant is tried or examined, on there being just reason to fear the commission of the crime threatened; it is in the form of an undertaking, in such sum as the magistrate may direct, not exceeding one thousand dollars, with one or more sufficient sureties, and conditioned that the defendant shall abide the order of the next court of sessions of the county, and in the meantime that he will keep the peace toward the people of this State, and particularly towards the complainant.²

On Assault in Presence of Court.—A person, who in the presence of a court or magistrate, assaults or threatens to assault another, or to commit a crime against his person or property, or who contends with another in angry words, may be thereupon ordered by the court or magistrate, to give security as provided above.³

After Commitment.—After commitment for a failure to give security in either of the foregoing cases, the person so committed, may be discharged, by any two justices of the peace of the county, or police or special justices of the city, upon giving the security required when committed.⁴

On Conviction in Certain Cases.—Any court before which a conviction is had of an offense not punishable by death or imprisonment in the State prison, in addition to the sentence authorized, may require the defendant to give security to keep the peace or to be of good behavior, or both, for any term not exceeding two years, or to stand committed until

¹ Code Crim. Pro., § 588.

³ Code Crim. Pro., § 93.

² Code Crim. Pro., § 89.

⁴ Code Crim. Pro., § 91.

such security be given, but this does not apply to cases of convictions for libel.¹

4. *Crimes Punishable With Death.*

The defendant cannot be admitted to bail, except by a judge of the Supreme Court or by a Court of Oyer and Terminer, where he is charged: 1. With a crime punishable with death; or, 2. With the infliction of a probably fatal injury, upon another, and under such circumstances, as that, if death ensue, the crime would be murder.² The only crimes punishable by death, are treason and murder in the first degree.³ These cases were formerly known as unbailable in this State, except where the facts did not sustain the charge; but now it would appear to be left in the discretion of the judge or court named. Under the Mississippi Bill of Rights, section 8, one accused of murder, is entitled to bail, if there is a reasonable doubt as to whether he committed the crime;⁴ but not, however, as a matter of right.⁵ In Indiana, where proof is evident, or presumption strong, murder in the second degree is not bailable.⁶

5. *Other Crimes.*

In all other cases than those just mentioned, the defendant may be admitted to bail, before conviction, as follows:

1. As a matter of right in cases of misdemeanor.
2. As a matter of discretion in all other cases.⁷

All crimes are either felonies or misdemeanors.⁸ A felony is a crime which is or may be punishable by either death or imprisonment in a State prison;⁹ all other crimes are misdemeanors.¹⁰ In all cases, then, where the punishment is imprisonment in a State prison, as well as in cases where

¹ 3 R. S., (5th ed.), 1031; id. (6th ed.), 1033; id. (7th ed.), 2572.

² Code Crim. Pro., § 552.

³ Penal Code, §§ 38, 186.

⁴ Ex parte, Bridewell, 57 Miss., 39.

⁵ Ex parte Fortenberry, 53 Miss., 428.

⁶ Ex parte Colter 35, Ind., 100.

⁷ Code Crim. Pro., § 553.

⁸ Penal Code, § 4.

⁹ Penal Code, § 5.

¹⁰ Penal Code, § 5.

the punishment is death, the taking of bail is a matter of discretion, and in all other cases a matter of right, before conviction.

6. *Bail for Appearance for Examination.*

When the defendant is held to appear for examination, bail for such appearance may be taken, either by the magistrate who issued the warrant, or before whom the same is returnable, or by any judge of the Supreme Court.¹ It is understood, of course, that this is in cases where the crime charged is not punishable by death, in which case, as we have seen, a judge of the Supreme Court or a Court of Oyer and Terminer only, can admit to bail. And this applies as well in all adjournments of the examination.² The bail, in such case, is an undertaking, with one or more sufficient sureties, approved by the magistrate or judge, conditioned for the appearance of the defendant during the examination, or at such time to which the examination is adjourned, or it may be a deposit of money as before stated.

As we have before seen the defendant must be taken before a magistrate without unnecessary delay, and may give bail at any time in the day or night, and that in the cities of New York and Brooklyn, a police justice to be designated from time to time by the mayors of those cities respectively, must be in attendance at the police head-quarters of the city, from four o'clock in the afternoon of each day, to ten o'clock the next morning, to take bail in proper cases if bail be offered.³

It is also provided that any captain or sergeant of police, in any city or village of this State, may take bail for appearance before a competent and accessible magistrate the next morning, from any person arrested for a misdemeanor between two o'clock in the afternoon and eight o'clock the next morning, if a magistrate competent to take the bail be not found within an hour after the arrest. When such captain or sergeant of police takes bail, he must take it by an undertaking, executed in his presence by the defendant,

¹ Code Crim. Pro., § 550; id., § 554, subd. 1.

² Code Crim. Pro., § 192 (see chap. 21, Laws 1876).

³ Code Crim. Pro., § 165.

and at least one surety, who must justify under oath, and for that purpose the officer may administer the oath; if the offense be the violation of a corporation ordinance, the amount of the bail must be \$100, except that if a conviction upon the charge would render the defendant liable only to fine, the amount of the bail must be double the largest fine that could be imposed; if the conviction would render him liable to imprisonment for thirty days or less, the amount of bail must be \$200. In all other cases the amount of bail must be \$500. The form of such undertaking must be as follows:

"We, A. B., defendant, and _____, residing at number _____, in _____, and C. D., defendant, residing at _____, hereby jointly and severally undertake that the above A. B., defendant, shall appear and answer the complaint (describing it briefly), before the magistrate before whom he would be arraigned, if not bailed, on the _____ day of _____ 18____, at _____ o'clock, to answer to the complaint, and there remain to answer, subject to any order of the magistrate, and render himself in execution thereof, or, if he fail to perform either of these conditions, then we will pay to the people of the State of New York the sum of _____." ¹

On Arrest for Felony.—If the crime charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, unless such magistrate be absent or unable to act, in which case he must take him before the nearest or most accessible magistrate in the same county.² From this it appears that no bail can be taken in such cases, out of the county where the warrant issued, or by any one other than the magistrate issuing the warrant, except he be absent or unable to act; and under the Revised Statutes it was held, that a justice of the Supreme Court had no power to let to bail a person arrested in the county of his residence, under a warrant issued in another county, or on a charge of a State prison offense.³

On Arrest for Misdemeanor.—If the crime charged in the warrant be a misdemeanor, and the defendant be arrested

¹ Code Civ. Pro., § 554, subd. 3.

² Code Crim. Pro., §§ 158, 164.

³ People ex rel. Sichel v. Chapman, 30 How. Pr., 202.

in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail for his appearance before the magistrate named in the warrant, and take bail from him accordingly.¹

Who are Magistrates.—It should be kept in mind that the title “*magistrate*” is not used in the Criminal Code in its limited and ordinary sense, but includes, by section 147 of said Code, as we have before seen, others than justices of the peace.²

7. *Before Indictment.*

Where the defendant, on being brought before the magistrate, waives examination and elects to give bail,³ and where, after examination, he is held to answer;⁴ bail may be taken by the magistrate holding him, if he be one of the magistrates named in section 147 aforesaid, either upon his being so held to answer, or at any time before the return of the depositions and statement to the court, when the crime charged is a misdemeanor, or a felony, punishable with imprisonment, not exceeding five years. In all other cases, either before or after the return of the depositions and statement, where bail may be taken before conviction, the defendant can be admitted to bail only by a judge of the Supreme Court, or any judge authorized to preside in a court having jurisdiction to try indictments:⁵ or by the court to which the depositions and statement are returned by the committing magistrate, if the case be triable therein, or if not, by the court to which, after indictment, it may be sent or removed for trial;⁶ except, however, that after the return of the depositions and statement of the committing magistrate to the court, if the court in which the crime is triable be in session, the defendant can be admitted to bail only by a judge presiding in such court.⁷ In addition to these provisions as to where the defendant may be admitted to bail, the court of Oyer and Terminer has jurisdiction conferred

¹ Code Crim. Pro., § 159.

² *Ante*, Section 1, chap., 3.

³ Code Crim. Pro., § 190.

⁴ Code Crim. Pro., § 208.

⁵ Code Crim. Pro., §§ 557-559.

⁶ Code Crim. Pro., § 558.

⁷ Code Crim. Pro., § 559.

expressly, "to let to bail any person committed, before and after indictment found, upon any criminal charge whatever;"¹ and courts of sessions "to let to bail persons committed to prison of the county before indictment, for any offense triable in that court,"² and courts of sessions may try for any crime not punishable with death.³ If the defendant be admitted to bail, but bail have not been taken, the commitment must contain words to the following effect: "and that he be committed to bail in the sum of dollars, and be committed to the sheriff of the county of (or in the city and county of New York, "to the keeper of the city prison of the city of New York") until he give such bail." ⁴

By Magistrate.—Where defendant is admitted to bail by a magistrate, it must be taken by the magistrate granting the order admitting to bail, unless the order designates some other magistrate by whom it may be taken.⁵

Notice of Application for.—In the several cities of this State, if the crime charged be a felony, the application for admission to bail must be upon notice of at least two days, to the district attorney of the county, unless the magistrate by order fixes a shorter time.⁶ This notice must state the time and place of giving the bail, the names, places of residence and occupations of the proposed surety or sureties, a general description of the real or personal property of the surety or sureties, in respect to which they propose to justify as to their sufficiency, with the incumbrances thereon, by mortgage, judgment or otherwise, if any; such notice may, however, be waived by the district attorney.⁷

Order for Bail.—Where application for bail is made to the court, an order must be made granting or denying it, and, if it be granted, stating the sum in which bail may be taken.⁸ If the application be made to a magistrate, he must certify, in writing, his decision, granting or denying the same; and, if he grant the application, must state in the certificate the sum in which bail may be taken.⁹

¹ Code Crim. Pro., § 22, subd. 8.

⁵ Code Crim. Pro., § 560.

² Code Crim. Pro., § 39, subd. 11.

⁷ Code Crim. Pro., § 571.

³ Code Crim. Pro., § 39, subd. 2.

⁸ Code Crim. Pro., § 561.

⁴ Code Crim. Pro., § 212.

⁹ Code Crim. Pro., § 562.

⁵ Code Crim. Pro., § 567.

Renewed Application for.—If an application for admission to bail, made to a magistrate, be denied, not more than two subsequent applications therefor can be made to other magistrates, unless it be to a judge of the Supreme Court, or a judge authorized to preside in a court having jurisdiction to try indictments, and no application to such a magistrate has been before made.¹ A violation of these provisions, in regard to a reapplication for bail, is a misdemeanor; and the admission of the defendant to bail, contrary thereto, may be revoked by the magistrate who made it, or vacated by the court to which the depositions and statement are or must be sent, or to which, after indictment, the action must be sent for trial.² Notwithstanding these provisions, the judge presiding in the court in which the offense is triable is not limited by them, to let the defendant to bail,³ and the decision of such judge granting or denying bail is final.⁴

Nature of Bail.—The bail, in such case, is for the appearance of the defendant at the court to which the magistrate is required to return the depositions and statements;⁵ that is, the next Court of Oyer and Terminer, or court of sessions of the county, or city court having power to inquire into the offense by the intervention of a grand jury.⁶ The Oyer and Terminer or court of sessions have power concurrently to inquire into any offense, by intervention of a grand jury, committed or triable in the county.⁷ The city court of Brooklyn has like power, as to any offense committed in the city of Brooklyn.⁸ The Superior Court of Buffalo has like power as to all crimes committed in the city of Buffalo.⁹ The recorder's court of Utica has like power as to all offenses committed in the city of Utica;¹⁰ and the recorder's court of Oswego has the same power, as

¹ Code Crim. Pro., § 563.

² Code Crim. Pro., § 564.

³ Code Crim. Pro., § 565.

⁴ Code Crim. Pro., § 566.

⁵ Code Crim. Pro., § 554, subd. 2.

⁶ Code Crim. Pro., § 221.

⁷ Code Crim. Pro., § 22, subd. 1, and § 39, subd. 1.

⁸ Code Crim. Pro., § 26.

⁹ Code Crim. Pro., § 28.

¹⁰ Code Crim. Pro., § 31; 3 R. S. (5th ed.), 339; id. (6th ed.), 248.

to offenses committed in the city of Oswego, or committed in this State on board of any vessel, boat or float navigating or floating on any river, lake or canal, which vessel, boat or float shall come within the jurisdiction of said court, or shall pass through, into or from the said city of Oswego on the same voyage or trip, and in all cases of larceny or embezzlement in which the property stolen or embezzled shall be brought or found within such jurisdiction.¹

Form of Undertaking.—The bail is in the form of a written undertaking, executed by sufficient surety. The defendant may join in such undertaking, in the discretion of the magistrate. It must be acknowledged before the magistrate taking it, and must be in substantially the following form :

“An order having been made on the day of , 18 , by A. B., *a justice of the peace of the town of* (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the crime), upon which he has been duly admitted to bail, in the sum of dollars :

We, C. D., defendant (if the defendant join in the undertaking), of (stating his place of residence and occupation) surety or sureties (as the case may be), hereby undertake, jointly and severally, that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted ; and shall, at all times ; render himself amenable to the orders and process of the court, and, if convicted, shall appear for judgment, and render himself in execution thereof ; or, if he fail to perform either of these conditions, that we will pay to the people of the State of New York the sum of dollars” (inserting the sum in which the defendant is admitted to bail).²

It is held in Texas that the undertaking is void for not conforming to the order of the committing court as to the amount ;³ but where the amount is larger than required, it should not be such a defect as to be fatal.

In Iowa it need not specify the offense in other than gen

¹ Code Crim. Pro., § 81 ; 3 R. S. (5th ed.), 344.

² Code Crim. Pro., § 569.

³ *Neblett v. State*, 6 Tex. App., 316.

eral terms,¹ which seems to accord with the provisions of the New York Code.

Who Qualified for Bail.—The qualifications of bail are as follows: 1. He must be a resident, and a householder or freeholder within the State, and, unless the magistrate otherwise direct, within the county. 2. He must be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the magistrate, on taking bail, may require two sureties, or may allow two or more to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of one sufficient surety.² By the rules of the Supreme Court, an attorney or counsellor cannot be bail.³

Justification.—The surety or sureties, must in all cases justify by affidavit, taken before the magistrate. The affidavit must state, that each of the sureties possesses the qualifications required as above.⁴ The bail may be taken and justify, in the discretion of the court or magistrate, without notice to the district attorney, or on reasonable notice to such officer, except that, as we have seen, in cities, and where the crime charged be a felony, notice must be given. When, in the discretion of the court or magistrate, notice is required, it must be the same as prescribed in cases of felonies in cities.⁵ In addition to the affidavit, the district attorney or the magistrate, may examine the sureties on oath, concerning their sufficiency, in such manner as the magistrate may deem proper. The questions and answers on such examination, must be reduced to writing, and must be subscribed by them;⁶ and other testimony, for or against the sufficiency of the bail may be received, and the taking of bail may be adjourned, from time to time, to afford an opportunity of proving or disproving its sufficiency.⁷ When the examination is closed, the magistrate must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification, and the undertaking of bail to be filed with

¹ State v. Merrihew, 47 Iowa, 112.

² Code Crim. Pro., § 569.

³ Sup. Ct Rules, 5.

⁴ Code Crim. Pro § 572.

⁵ Code Crim. Pro., § 570.

⁶ Code Crim. Pro., § 573.

⁷ Code Crim. Pro., § 574.

the clerk of the court, to which the depositions and statement must be sent.¹

Discharge on.—Upon the allowance of the bail, and the execution of the undertaking, the court or magistrate must make an order, signed by him, with his name of office, for the discharge of the defendant, to the following effect:

“To the sheriff of the county of (or, in the city and county of New York, ‘to the keeper of the city prison of the city of New York):’”

“A. B., who is detained by you, on a commitment, to answer a charge for the crime of (designating it generally), having given sufficient bail, to answer the same, you are commanded, forthwith, to discharge him from your custody.”² If the bail is not allowed, on justification, the defendant must be detained in custody until lawfully discharged.³

8. *Special Sessions.*

In courts of special sessions, pending the trial and judgment, the defendant must be, either before, or after, or upon commitment, admitted to bail.⁴ The bail must be taken by the magistrate, by a written undertaking, executed by the defendant, with one or more sufficient sureties approved by the magistrate, in a sum not exceeding two hundred dollars;⁵ and must be in substantially the following form:

“A. B., having been duly charged before C. D., a justice of the peace, in the town (or city) of (as the case may be), with the offense of (designating the offense generally).”

“We undertake, jointly and severally, that he shall appear thereon, from time to time, until judgment, at a court or special sessions in the town or village (or city) of (as the case may be), competent to try the case, or that we pay to the county of (naming the county in which the court is held), the sum of dollars (inserting the sum fixed by the magistrate).

“Dated at the town (or city) of (as the case may be).”⁶ This applies as well to courts of special sessions in the city of New York.⁷

¹ Code Crim. Pro., § 575.

⁵ Code Crim. Pro., § 737.

² Code Crim. Pro., § 576.

⁶ Code Crim. Pro., § 738.

³ Code Crim. Pro., § 577.

⁷ Code Crim. Pro., § 741.

⁴ Code Crim. Pro., § 736.

9. *Police Courts.*

The above provisions of the Code of Criminal Procedure, in reference to bail, are also applicable to all police courts.¹

10. *Special Sessions in New York.*

The court of special sessions in the city and county of New York have authority to try all misdemeanors,² unless the defendant elects to be tried at the court of general sessions;³ and to take recognizance for appearance of accused at said court of special sessions, and to require the defendant to enter into a further recognizance to keep the peace or be of good behavior.⁴ These recognizances should be in writing, and are in substance the same as provided for in courts of special sessions in other counties.

11. *Special Sessions in Albany.*

Upon charges for offenses triable before the court of special sessions in the city of Albany, the police magistrates and other magistrates in said city shall, if offered, take recognizances in the cases provided by law, returnable at the said court of special sessions.⁵ This court has power to take recognizances from the accused, for his appearance at a succeeding term, in all cases triable therein.⁶ The clerk of the court may continue the recognizances, on an adjournment of the court, from time to time, on account of the inability of the recorder or county judge to hold the court.⁷ The recognizances given in this court should be in writing, in substantially the same form as in other courts of special sessions.

Utica City Court.—Justices of the peace in the city of Utica have no power to hold courts of special sessions, nor to issue process, by which any proceeding in a court of special sessions, in said city, may be commenced or furthered. The city court of Utica has the same, with other powers, as

¹ Code Crim. Pro., §§ 699, 74.

² Code Crim. Pro., § 64; Laws 1859, chap. 491, § 1.

³ Code Crim. Pro., § 64, subd. 1.

⁴ Code Crim. Pro., § 64, subd. 6; Laws 1859, chap. 491, § 1.

⁵ Laws 1872, chap. 284, § 2.

⁶ Code Crim. Pro., § 68, subd. 2; Laws 1872, chap. 284, § 11.

⁷ Laws 1872, chap. 284, § 14.

a court of special sessions in that city, and may, in its discretion, admit to bail to await the action of any grand jury, and to take bail for the appearance of the defendant for trial, in the forms prescribed by the Code of Criminal Procedure, in all criminal actions triable therein. The defendant, charged with misdemeanor, committed within the corporate limits of said city, shall not have the right to give bail to await the action of any grand jury, except in the discretion of said court.¹

12. *After Indictment.*

Misdemeanors.—Where the defendant is indicted for a misdemeanor, and is arrested on a bench warrant, the officer making the arrest, must, if required by the defendant, take him before a magistrate in the county in which the warrant is issued, or in which the arrest is made, for the purpose of giving bail. As we have already seen, this requirement, in case of misdemeanors, is contained in the warrant itself; and the court, upon directing the warrant to issue, may fix the amount of bail, when an indorsement is made on the warrant of the amount of bail required. Where the defendant is brought before a magistrate of another county, as above provided, for the purpose of giving bail, such magistrate must admit him to bail, and certify the fact on the warrant, and deliver the warrant and undertaking to the officer having charge of the defendant, upon which the defendant must be discharged.² And where brought before a magistrate of the same county where the warrant issued, the same proceedings should be had.

Felonies.—If the crime charged in the indictment be a felony, the officer arresting must deliver the defendant into custody, in accordance with the command of the warrant; when if the felony charged be bailable, and the amount of bail fixed, bail must be taken by the judge presiding in the court in which the indictment was found, or to which it was sent or removed, or by any judge of the Supreme Court, or any judge authorized to preside in a court, having jurisdiction to try indictments in the county.³ It has been

¹ Laws 1882, chap. 352.

³ Code Crim. Pro., § 580.

² Code Crim. Pro., § 578.

held that, independent of any statute, any one justice may bail persons indicted before the sessions, on the principle that every member of a court, having authority to try an offense, can bail the offender¹

Form of Undertaking.—The bail must be put in by a written undertaking, executed by a sufficient surety, with or without the defendant, in the discretion of the magistrate, and must be acknowledged before the magistrate, and be in substantially the following form :

“An indictment having been found on the day of , 18 , in the *court of sessions in the county of Albany* (or as the case may be), charging A. B., with the crime of (designating it generally), and he having been duly admitted to bail in the sum of dollars :

“ We, A. B., defendant, and (if the defendant join in the undertaking) C. D., surety or sureties, as the case may be, of (stating his place of residence and occupation), and E. F., of (stating his place of residence and occupation), hereby, jointly and severally, undertake, that the above named A. B. shall appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court ; and, if convicted, shall appear for judgment, and render himself in execution thereof ; or if he fail to perform either of these conditions, that we will pay to the people of the State of New York the sum of dollars,” (inserting the sum in which the defendant is admitted to bail.”)²

The undertaking is held not invalid, in Louisiana, for not technically describing the offense ; nor for describing one of a lower grade than that in the indictment.³

Qualification and Justification of Bail, etc.—What has been said in regard to the qualifications of the sureties, and the proceedings respecting the putting in and justification of bail and incidental thereto, upon bail before indictment, applies also to bail after indictment.⁴

¹ *People v. Huggins*, 10 Wend., 465.

² Code Crim. Pro., § 581.

³ *State v. Tennant*, 30 La., An., part 2, 852.

⁴ Code Crim. Pro., § 582.

13. *On Arrest After Bail.*

The court, to which the committing magistrate returns the deposition and statement, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, or, if the court be not in session, any judge thereof, may direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time he was admitted to bail, and his detention until legally discharged, in the following cases: 1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited in lieu thereof. 2. When it satisfactorily appears to the court that his bail, or either of them, are dead, or insufficient, or have removed from the State. 3. Upon an indictment being found, either without bail or unless he give bail in an increased amount, to be specified in the order.¹ When such an order is made for any other cause than the failure of the defendant to appear for judgment upon conviction (the order must recite the cause), and the crime be bailable, the court may fix the amount of bail, and may direct in the order that the defendant may be admitted to bail in the sum fixed, which must be specified in the order.²

Who May Take.—In these cases, the bail may be taken by any magistrate in the county, having authority, in a similar case, to admit to bail upon holding the defendant to answer before indictment, or by any other magistrate to be designated by the court.³

Undertaking, Qualifications of Bail, etc.—The undertaking must be in substantially the following form:

“An order having been made on the day of 18 , by the court of (naming the court), that A. B. be admitted to bail, in the sum of dollars, in an action pending in that court against him in behalf of the people of the State of New York, upon an (information, presentment, indictment or appeal, as the case may be).”

“We, A. B., defendant (if the defendant join in the undertaking), and C. D., surety of (stating his place of res-

¹ Code Crim. Pro., § 599.

³ Code Crim. Pro., § 604.

² Code Crim. Pro., § 600, 602, 603.

idence and occupation), and E. F., surety of (stating his place of residence and occupation), hereby, jointly and severally, undertake that the above named A. B. shall appear in that, or any other court, upon that (information, presentment, indictment or appeal, as the case may be), and shall, at all times, render himself amenable to its orders and process, and appear for judgment, and surrender himself in execution thereof; or, if he fail to perform either of these conditions, that he will pay to the people of the State of New York the sum of dollars (inserting the sum in which the defendant is admitted to bail).”¹

The bail must possess the same qualifications, and must be put in, in all respects, in the same manner as bail, before indictment.”

14. *On Arraignment and after a Trial.*

Indictment Set Aside.—Where a motion to set aside, an indictment or arraignment, is granted, the court may direct that the case be re-submitted to the grand jury, in which case the defendant, if in custody, may be admitted to bail, to answer a new indictment; if already admitted to bail, or if money has been deposited in lieu of bail, the bail or money is answerable for the appearance of the defendant to answer a new indictment.”

Where Testimony Shows Higher Crime.—If, on the trial, the testimony shows the crime to be of a higher nature than charged in the indictment, the jury may be discharged by the court, and all proceedings on the indictment suspended, and the defendant may be committed, or continued on or admitted to bail to answer any new indictment which may be found against him for the higher offense.⁴

Indicted in Wrong County.—If the crime were committed within the exclusive jurisdiction of another county of this State, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county; or, if the crime be a misdemeanor only, it may admit him to bail, in an undertaking with sufficient sureties, that he will, within such time as

¹ Code Crim. Pro., § 605.

² Code Crim. Pro., § 606.

³ Code Crim. Pro., § 318.

⁴ Code Crim. Pro., § 400.

the court may appoint, appear in such court to await a warrant from the proper county for his arrest.¹

When Facts Charged Constitute no Offense.—When the jury is discharged, because the facts as charged do not constitute a crime, and in the opinion of the court, a new indictment can be framed, upon which the defendant can be legally convicted, the case may be directed to be re-submitted to the same or another grand jury,² and thereupon the defendant, if in custody, may be admitted to bail to answer a new indictment.³

Arrest of Judgment.—When judgment is arrested, if there is reasonable ground to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, he may be recommitted or admitted to bail anew to answer the new indictment, and, if there is reasonable ground to believe him guilty of another crime, he must be recommitted or held to answer therefor.⁴

15. *When Taken in Open Court.*

All recognizances required or authorized to be taken in any criminal proceeding, in open court, by any court of record, shall be entered in the minutes of such court, and the substance thereof shall be read to the person recognized.⁵

16. *On Appeal.*

After conviction of a crime not punishable with death, a defendant, who has appealed, may be admitted to bail, when there is a stay of proceedings; as a matter of right when the judgment appealed from imposes a fine only, and as a matter of discretion in all other cases.⁶

Stay on, when.—An appeal to the Supreme Court from a judgment of conviction, other than a judgment of death, or from any other determination from which an appeal can be taken, stays the execution of the judgment or determination, upon filing, with the notice of appeal, a certificate of

¹ Code Crim. Pro., § 404.

² Code Crim. Pro., § 408.

³ Code Crim. Pro., § 409.

⁴ Code Crim. Pro., § 470.

⁵ 3 R. S. (5th ed.), 1040; id. (6th ed.), 1045; id. (7th ed.), 2576.

⁶ Code Crim. Pro., § 555.

the judge who presided at the trial, or of a judge of the Supreme Court, that, in his opinion, there is reasonable doubt whether the judgment should stand, but not otherwise;¹ and an appeal to the Court of Appeals, from a judgment of the Supreme Court, affirming a judgment of conviction, other than a judgment of death, stays the execution of the judgment appealed from, upon filing with the notice of appeal a like certificate of a judge of the Court of Appeals, or of the Supreme Court.² Neither of these certificates can, however, be granted in case of a conviction for felony, until such notice as the judge may prescribe, has been given to the district attorney of the county where the conviction was had, of the application therefor. But the judge may, in the meantime, stay execution of judgment.³

Who can Admit, Notice of, etc.—The order admitting to bail may be made, either by the court from which the appeal is taken, or the presiding judge thereof, or by the appellate court, or a judge thereof, or by a judge of the Supreme Court;⁴ and the court or officer to whom the application is made may require such notice thereof as he deems reasonable, to be given to the district attorney of the county in which the verdict or judgment was originally rendered;⁵ and as in cases of bail before indictment, in any city, where the charge is a felony, like notice must be given to the district attorney. The same qualifications of sureties, and the same manner of putting in the bail must be followed as in giving bail before indictment.⁶

.. *The Undertaking.*—If the appeal be from a judgment imposing a fine only, the bail must undertake that the defendant will pay the same, or such part of it as the appellate court may direct, if the judgment be affirmed or modified or the appeal dismissed. If the judgment be for imprisonment, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed;⁷ and in either case the undertaking

¹ Code Crim. Pro., § 527.

² Code Crim. Pro., § 528.

³ Code Crim. Pro., § 529.

⁴ Code Crim. Pro., § 583.

⁵ Code Crim. Pro., § 584.

⁶ Code Crim. Pro., § 585.

⁷ Code Crim. Pro., § 556.

must be to the effect, that the defendant will, in all respects, abide the orders and judgment of the appellate court upon the appeal.¹

On Appeal from Courts of Special Sessions.—Appeals from judgments on convictions by a court of special sessions, may be allowed on application to the county judge or a judge of the Supreme Court, or, in the city and county of New York, to the recorder, or city judge, or judge of general sessions of that city; and, if allowed, the judge may take from the defendant, a written undertaking, with such sureties as he may approve, that the defendant will abide the judgment of the court of sessions upon the appeal.²

If the judgment, on appeal, be against the defendant, he may appeal therefrom to the Supreme Court, in the same manner as from a judgment in an action prosecuted by indictment, and may be admitted to bail upon the appeal in like manner.³

17. *On Dismissal for want of Prosecution or Indictment.*

When a person has been held to answer for a crime, if an indictment be not found against him, at the next term of the court at which he is held to answer, the court may, on application of the defendant, order the prosecution to be dismissed, unless good cause to the contrary be shown;⁴ and, after indictment, if the trial is not postponed on defendant's application, if it be not brought to trial at the next term of the court in which the indictment is triable after it is found, the court may, on application, order the indictment to be dismissed, unless good cause is shown for not so doing.⁵

In either of these cases, where sufficient reason is shown therefor, the court may order the action to be continued from term to term, and, in the meantime, may discharge the defendant from custody, either on his own undertaking or the undertaking of bail, for his appearance to answer the charge at the time to which the action is continued.⁶

¹ Code Crim. Pro., § 585.

⁴ Code Crim. Pro., § 667.

² Code Crim. Pro., §§ 749, 751, 752, 753.

⁵ Code Crim. Pro., § 668.

³ Code Crim. Pro., § 770.

⁶ Code Crim. Pro., § 669.

18. *Fugitives from Justice.*

A person arrested in this State as a fugitive from justice, may be admitted to bail, in the first instance, only by a judge of the Supreme Court, by an undertaking, with sufficient sureties, and in such amount as he deems proper, for his appearance before him, at a time specified in the undertaking, and for his surrender, to be arrested upon the warrant of the governor of this State.¹

Upon the return by the magistrate of his proceedings, upon the arrest of a fugitive from justice, to the next court of sessions of the county, such court may, after inquiring into the cause of the arrest, re-admit the defendant to bail, to appear and surrender himself, within a time specified in the undertaking.²

19. *For Appearance of Witnesses.*

Where upon examination on the charge of the commission of a crime, the defendant is held to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people, a written undertaking to the effect that he will appear and testify at the court, to which the depositions and statement are to be sent, or that he will forfeit the sum of \$100;³ and when the magistrate is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify, unless security be required, he may order the witness to enter into a written undertaking, with such sureties, and in such sum as he may deem proper, for the appearance of such witness at the court before mentioned.⁴ Infants and married women are not exempt from being required to so give surety for their appearance as witnesses.⁵ So, too, where the defendant waives an examination, and elects to give bail, the witnesses in attendance or shown to be material for the people, may be required to give an undertaking for their appearance as aforesaid.⁶

In either of the above cases, however, if it satisfactorily appears, by the examination on oath of the witness, or any

¹ Code Crim. Pro., § 831.

² Code Crim. Pro., § 835.

³ Code Crim. Pro., § 215.

⁴ Code Crim. Pro., § 216.

⁵ Code Crim. Pro., § 217.

⁶ Code Crim. Pro., § 190.

other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined, in behalf of the people, and be discharged.¹

20. *Surrender of Defendant.*

At any time before the forfeiture of the undertaking, any surety may surrender the defendant in his exoneration, or the defendant may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner :

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon a commitment, and by a certificate, in writing, acknowledge the surrender.

2. Upon the undertaking, and the certificate of the officer, the court, in which the indictment or the appeal, as the case may be, is pending, may, upon a notice of five days to the district attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated ; and on filing the order and the papers, used on the application, the bail is exonerated accordingly.² For the purpose of surrendering the defendant, any surety, at any time before he is finally charged, and at any place in the State, may himself arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.³ The rendition of the principal in court, and refusal of the bail to stand as bail until another court, is held to be a virtual surrender.⁴

21. *On Arrest Upon Coroner's Warrant.*

On arrest upon a warrant issued by a coroner, as we have seen, no further proceedings are had before the coroner issuing the warrant, but all subsequent proceedings, including the giving of bail, are had before a magistrate in the same manner as upon a warrant of arrest on an information.⁵

¹ Code Crim. Pro., § 219.

² Code Crim. Pro., § 590.

³ Code Crim. Pro., § 591.

⁴ *People v. Clary*, 17 Wend., 373.

⁵ Code Crim. Pro., §§ 781, 783.

22. *In Bastardy Proceedings.*

In these proceedings, as we have before seen, where the defendant resides in another county than that in which the warrant issued, the magistrate indorses on the warrant the amount in which security shall be given ;¹ and the defendant, on being arrested in another county, is taken before the magistrate in such other county who has, on proof of the signature of the magistrate issuing the warrant, indorsed a direction for its execution in that county, or before another magistrate of the same city or county, and may be released on giving an undertaking, with sufficient sureties, to the effect :

1. That he will indemnify the county, and town or city, where the bastard was or is likely to be born, and every other county, town or city against any expense for the support of the bastard, or of its mother, during her confinement and recovery, and to pay the costs of arresting the defendant, and of any order of filiation that may be made, or that the sureties will pay the sum indorsed on the warrant ; or,

2. That the defendant will appear and answer the charge at the next court of sessions of the county where the warrant was issued, and obey its order thereon.²

On Adjournment of Examination.—The examination may be adjourned on defendant's application, for good cause, not exceeding thirty days, upon the defendant giving an undertaking, with two sufficient sureties, to the effect that he will appear before the magistrates at the time appointed, or that the sureties will pay the sum mentioned therein, which must be fixed by the magistrates, and must be in an amount to fully indemnify for the expense of supporting the bastard and the mother during her confinement and recovery, as provided upon the making of an order of filiation.³

On Order of Filiation.—If the defendant, upon examination, be adjudged the father of the bastard, he may be released upon payment of the costs of the arrest and of the order of filiation, by entering into an undertaking, with sufficient sureties, approved by the magistrates, to the effect :

¹ Code Crim. Pro., § 843.

³ Code Crim. Pro., § 849.

² Code Crim. Pro., §§ 844, 845.

1. That he will pay weekly, or otherwise, as may have been ordered, the sum directed for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the court of sessions of the county; and that he will indemnify the county, and town or city where the bastard was or may be born (as the case may be), and every other county, town or city which may have been or may be put to expense for the support of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the magistrates; or,

2. That he will appear at the next court of sessions of the county to answer the charge, and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother.¹

On Order for Mother to Support Bastard.—The mother of a bastard may be, if possessed of property in her own right, ordered to support it,² and, on her failure to comply with an order therefor, may be committed until she comply therewith, or enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect that she will appear at the next court of sessions of the county to answer the matters stated in the order, and obey its order thereon, or that the sureties will pay the sum mentioned in the undertaking, which sum must be fixed by the magistrates.³

Reduction or Increase of Amount Directed to be Paid.—The magistrates making the order against the father or mother of a bastard may, from time to time, reduce the amount directed to be paid, and the court of sessions of the county may reduce or increase the amount,⁴ and, upon an increase thereof, a new undertaking must, of course, be entered into, in accordance with the change.

On Adjournment of Hearing Before Court of Sessions.—If the bastard be not born when the appeal is heard by the court of sessions, the hearing may be adjourned until it is born, and, in that case, the party appealing must give

¹ Code Crim. Pro., §§ 851, 852.

² Code Crim. Pro., § 857.

³ Code Crim. Pro., § 858.

⁴ Code Crim. Pro., § 859.

an undertaking for his appearance, in such sum and with such sureties as the court may deem sufficient.¹

On Affirmance of Order of Filiation by Court of Sessions.—If the court of sessions affirm the order of filiation, it must require an undertaking with sufficient sureties, approved by the court, to the effect that he will pay, weekly or otherwise, according to the order made by the magistrates or modified by the court, the sum directed for the support of the bastard, and of the mother during her confinement and recovery, and that he will indemnify the county, and town or city where the bastard was or may be born (as the case may be), and every other county, town or city which may have been put to expense for the support of the child, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court.²

On Affirmance of Order Against the Mother by Court of Sessions.—If the court of sessions affirm an order made by magistrates, directing the mother to contribute to the support of a bastard, it must require her to enter into an undertaking, with sufficient sureties approved by the court, to the effect that she will pay, weekly or otherwise, according to the order, as made by the magistrates or modified by the court, the sum directed for the support of the bastard, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the court.³

On Vacating Order of Filiation.—When the court of sessions vacates an order of filiation for any other cause than upon the merits, it must proceed, and may make an original order of filiation, or bind the person charged, in an undertaking, in a sum and with sureties approved by the court, to appear at the next court of sessions;⁴ and in case of such vacating and binding by undertaking, the same proceedings may be had by the magistrate, for the apprehension of the defendant, and for the making of an order of

¹ Code Crim. Pro., § 865.

² Code Crim. Pro., § 872.

³ Code Crim. Pro., § 867.

⁴ Code Crim. Pro., § 875.

filiation, and for the commitment of the defendant for not giving an undertaking as are authorized in the first instance.¹

23. *Disorderly Persons.*

When, upon the confession of the defendant, or upon testimony, the magistrate is satisfied that he is a disorderly person, he may be discharged on giving security by a written undertaking, with one or more sureties approved by the magistrate. If he has abandoned his wife or children without adequate support, or leaves them in danger of becoming a burden on the public, or neglects to provide for them according to his means; or threatens to run away and leave them a burden upon the public; the undertaking must be to the effect that he will support his wife and children, and will indemnify the county, city, village or town against their becoming, within one year, chargeable upon the public; or that the sureties will pay the sum mentioned in the undertaking, which must be fixed by the magistrate. In all other cases the undertaking must be to the effect that the defendant will be of good behavior for the space of one year, or that the sureties will pay the sum fixed by the magistrate.²

After Commitment of.—After commitment for failure to give the security required, the defendant may be discharged by any two justices of the peace, or police justices, in the county, upon giving security, as originally required.³

New Security.—Upon a recovery on the undertaking, the court in which it is had may require new security from the defendant, which will be by undertaking in the same form as the original, in such sum as may be fixed by such court.⁴

City Court of Utica.—This court has jurisdiction of bastardy proceedings, arising in the city of Utica.⁵

24. *On Proceedings Respecting Masters and Servants.*

On complaint being made by a clerk or apprentice to a justice of the peace or police justice of the county, against

¹ Code Crim. Pro., §§ 875, 876.

⁴ Code Crim. Pro., § 906.

² Code Crim. Pro., §§ 901, 902.

⁵ Laws 1882, chap. 352.

³ Code Crim. Pro., § 907.

his master, to whom money is paid, or agreed to be paid, upon his being bound out, that such master is guilty of cruelty, misuse, refusal of necessary provisions or clothing, or of any violation of duty toward such clerk or apprentice, as prescribed by special statutes, or by the indenture or contract of service; such magistrate, after examination, if the complaint cannot be compromised, must take a written undertaking from the master, for his appearance at the next court of sessions in the county, in a sum, and with sureties approved by him.¹

25. *For Perjury of Witness.*

Where it appears to a court of record, probable, that a witness testifying before it has committed perjury in such testimony, the witness may be held to bail for his appearing and answering to an indictment for the perjury, as also may witnesses to establish such perjury, be held by recognizance for their appearance to testify.²

SECTION VI.

OF THE CARE AND CUSTODY OF PRISONERS.

1. *To Receive and Keep all Persons Committed. Consequences of Failure so to do.*

The duties of sheriffs as keepers of the county jail, are spoken of in another place. It is his duty as regards the custody of prisoners, to receive, and safely keep therein, every person duly committed to the jail of which he is keeper, for whatever purpose such commitment is made, pursuant to law, and he shall not permit anyone so committed to go out of jail, on bail or otherwise, without authority of law for so doing;³ and for neglect or refusal so to receive a person duly committed, he is guilty of a misdemeanor.⁴ And a sheriff or other officer who allows a prisoner, lawfully in any prison under his charge or control, in any action

¹ Code Crim. Pro., §§ 935, 934, 931, 932.

² Penal Code, §§ 102, 103.

³ 3 R. S. (5th ed.), 1061; 3 id. (6th ed.), 1063; 3 id. (7th ed.), 2589.

⁴ Penal Code, § 116.

or proceeding, civil or criminal, to escape or go at large, except as permitted by law, or connives at or assists such escape, or omits an act or duty whereby such escape is occasioned, or contributed to or assisted, is guilty of a misdemeanor, and if he willfully allows, connives at, or assists the escape, he is guilty of a felony, and forfeits his office, and is ever disqualified to hold any office, or place of trust, honor or profit, under the constitution or laws of this State.¹

2. Examination and Record of Commitments, and Entry of Discharge.

The commitment being the authority for receiving and confining a prisoner, it should be examined before receiving the prisoner into custody, and should appear regular on its face, including the signature of a magistrate or other officer having authority and jurisdiction.

This examination of the commitment will not only enable the officer to determine whether he is justified in receiving the prisoner, but will show how the prisoner is to be dealt with while confined. The keeper of each county prison must keep a daily record of commitments and discharges of all prisoners delivered to his charge, in which must be entered the following facts, viz: the date of entrance, name, offense, term of sentence, fine, age, sex, county, color, social relations, parents and habits of life of the prisoner, whether prisoner can or cannot read, whether prisoner can read only, or can read and write, if well educated, if classically educated, what, if any, religious instructions have been, how committed, by whom committed, state of health when committed, how discharged, trade or occupation, whether so employed when arrested, number of previous convictions, if any, and value, of articles stolen, if any.²

3. How Confined.

All the prisoners must be kept separate and distinct from each other, and all conversation between them must be prevented, as far as may be practicable; and

¹ Penal Code, § 89.

² 3 R. S. (5th ed.), 1063; id. (6th ed.), 1064; id. (7th ed.), 2590.

male and female prisoners (except husband and wife), shall not be kept in the same room. Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of inferior but wholesome food, at the county expense.¹

Convicts.—A distinction is made in the treatment of prisoners, committed on sentence in the execution of criminal judgment, and those committed to await trial, or on civil process for contempt, or for detention as witnesses, the former having been convicted are denominated convicts, and should not be permitted to hold any conversation with any person, except the keepers or inspectors of the prison, unless in the presence of a keeper or inspector.² The governor and lieutenant governor, secretary of state, controller and attorney general, members of the legislature, judges of the Court of Appeals, Supreme Court and county judges, district attorneys, and every minister of the gospel, having charge of a congregation in the town wherein the prison is situated, are authorized to visit at pleasure all county and State prisons, and no other person not otherwise authorized by law shall be permitted to enter the rooms of a county prison in which convicts are confined, unless under such regulations as the sheriff of the county shall prescribe.³ Convicts should be, unless under sentence of death, kept constantly employed at hard labor when practicable, during every day except Sunday, and it is the duty of the county judge, or of the inspectors appointed by him, to prescribe the kind of labor, and of the keeper to account at least annually, with the board of supervisors of the county, for the proceeds of such labor; and he shall have power, with the consent of the supervisors of the county, from time to time, to cause such convicts as are able, to be employed upon any of the public avenues, highways, streets or other works, in the county where they are confined, or in any of the adjoining counties, upon such terms as shall be agreed upon, between said keeper and the officer or other person, under whose direction such convicts shall be placed, and when so

¹ 3 R. S. (5th ed.), 1061; id. (6th ed.), 1063, 1064; id. (7th ed.), 2589.

² Id.

³ 3 R. S. (5th ed.), 1101; id. (6th ed.), 1107; id. (7th ed.), 2625.

employed they shall be well chained and secured, and shall be subject to such regulations, as the keeper legally charged with their custody, shall, from time to time, prescribe.¹ A person sentenced, on conviction, to imprisonment in a county jail, may be sentenced to imprisonment in a solitary cell therein, for a period not to exceed thirty days, provided such cell be erected.²

Disorderly Persons.—Disorderly persons are, in pursuance of their conviction and sentence, to be kept at hard labor;³ and the keeper of every prison shall return to the court of sessions of every county, on the first day of each term, a list of the persons so committed and then in custody, with the nature of the offense of each, the name of the magistrate by whom he was committed, and the term of his imprisonment.⁴ The court of sessions, after inquiry and examination, may, if no other disposition be made of the case, order such person to be kept in the county jail, or, in the city of New York, in the city prison or penitentiary of that city for not more than six months at hard labor.⁵ The Revised Statutes add to this, authority to direct that not more than thirty days of the time such offender be kept on bread and water only, but this is not included in the provisions of the Code, and it is fair to presume that it is abrogated.⁶ If there be no means provided in the prison for employing the offender at hard labor, the court may direct the keeper to furnish him such employment as it may specify, and for that purpose to purchase materials and implements, not exceeding a prescribed value, and to compel the offender to perform the work allotted to him. The expense incurred in carrying the order into effect must be paid to the keeper by the county treasurer, upon the delivery to him of the order of the court, and an account under the oath of the keeper of the materials and implements furnished; and the keeper must sell the produce of the labor of the offender, and must account for the cost of

¹ 3 R. S. (5th ed.), 1062; id. (6th ed.), 1064; id. (7th ed.), 2590.

² 3 R. S. (5th ed.), 980; id. (6th ed.), 983; id. (7th ed.), 2521.

³ Code Crim. Proc., § 903.

⁴ Code Crim. Proc., § 908.

⁵ Code Crim. Proc., § 911.

⁶ 2 R. S. (5th ed.), 905; id. (6th ed.), 894; id. (7th ed.), 1949.

the materials or implements purchased, and for one-half of the surplus, to the board of supervisors, and pay it into the county treasury, and pay the other half of the surplus to the person by whom it was earned on his discharge from imprisonment. He must also account to the court, when required, for the materials and implements purchased, or for the disposition of the proceeds of the labor of the offender.¹ No person who, by reason of lunacy or otherwise, is furiously mad, or so far disordered in his mind as to be dangerous if permitted to go at large, shall be committed as a disorderly person, to any prison, jail, house of correction, or confined therein, unless an agreement shall have been made for that purpose with the keepers thereof; and shall not be confined in the same room with any person charged with or convicted of a crime. Such person shall not be confined in any jail more than ten days; and, if continuing to be insane at the expiration of ten days, shall be sent to a lunatic asylum. It is a misdemeanor, punishable with fine not exceeding \$250, or imprisonment not exceeding one year, or both, to confine any lunatic in any other place than above prescribed.²

Other Prisoners.—Prisoners committed on criminal process, and detained for trial, and persons committed for contempts, or upon civil process, shall be kept in rooms separate and distinct from those in which convicts are confined, and shall, on no pretense whatever, be kept in the same room with convicts.³ Prisoners detained for trial are permitted to converse with their counsel, and such others as the keeper may allow,⁴ and may, at their own expense, under direction of the keeper, be supplied with other proper articles of food than are supplied by the county.⁵ These provisions, in regard to all persons charged with offenses and held for trial, apply to county jails where no house of detention is provided under the Laws of 1875, chapter 464. Where such places are provided as authorized by said act,

¹ Code Crim. Pro., §§ 912, 913.

² Laws 1874, chap. 446; 2 R. S. (6th ed.), 842, et seq.; 3 id (7th ed.), 1899, 1900, 1902, 1903.

³ 3 R. S. (5th ed.), 1062; id. (6th ed.), 1063; id. (7th ed.), 2589.

⁴ 3 R. S. (5th ed.), 1062; id. (6th ed.), 1063; id. (7th ed.), 2589.

⁵ 3 R. S. (5th ed.), 1062; id. (6th ed.), 1064; id. (7th ed.), 2590.

except in the counties of Kings and New York, all such prisoners, if women or girls, or boys under sixteen, are committed and detained in such house of detention, instead of the jail, unless the crime charged is punishable by death or imprisonment in a State prison for a term exceeding five years, or where charged with the second offense. And where such houses of detention are provided, all persons detained as witnesses are to be confined therein; where no such places are provided, witnesses are detained in the jail, but should be confined in separate rooms from persons charged with or convicted of crime.¹ All persons committed on a conviction for profane cursing or swearing must be confined in a room separate from all other prisoners.²

Bastardy.—Although, from general provisions, it would seem unnecessary, it is especially provided that the father of a bastard, committed to prison in default of an undertaking, shall be actually confined therein.³

4. *Escape.*

A prisoner in custody, under sentence of imprisonment for any crime, who escapes from custody, may be recaptured and imprisoned for a term equal to that portion of his original term of imprisonment which remained unexpired upon the day of his escape.⁴

5. *Insane.*

When a defendant pleads insanity, or, if a defendant in confinement, under indictment, appears to be at any time, before or after conviction, insane, the court in which the indictment is pending, unless the defendant is under sentence of death,⁵ may appoint a commission of not more than three disinterested persons, to examine him and report to the court as to his sanity at the time of the commission

¹ 3 R. S. (5th ed.), 1061; id. (6th ed.), 1063; id. (7th ed.), 2589.

² 2 R. S. (5th ed.), 934; id. (6th ed.), 926; 3 id. (7th ed.), 1973.

³ Code Crim. Pro., § 853.

⁴ Penal Code, § 84; See 3 R. S. (7th ed.), 2508; *Haggarty v. People*, 53 N. Y., 476; *Nall v. State*, 34 Ala., 262; *Riley v. State*, 16 Conn., 47.

⁵ [This is the language of the Code of Criminal Procedure, although it would appear that, after conviction, or after sentence of death, the defendant cannot be properly described as "under indictment," or an indictment be said to be "pending" in any court.]

of the crime.¹ If the commission find the defendant insane, the trial or judgment must be suspended until he becomes sane; and the court, if it deems his discharge dangerous to the public peace or safety, must order that he be, in the meantime, committed by the sheriff to a State lunatic asylum, and that, upon his becoming sane, he be redelivered by the superintendent of the asylum to the sheriff.² If received into the asylum, the defendant is confined there until sane. When notice is given of that fact to a judge of the Supreme Court of the district in which the asylum is situated, whereupon the judge must require the sheriff, without delay, to bring the defendant from the asylum and place him in the proper custody until he be brought to trial, judgment, or execution as the case may be, or be legally discharged.³ It is also provided by statute that if any prisoner in a county jail not committed for contempt or on civil process, including a witness detained therein for appearance, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, by calling two respectable physicians and other credible witnesses, and inviting the district attorney to assist in the examination, and, if he deems it necessary, calling a jury for the purpose; and, if it be satisfactorily proven that he is insane, he may discharge him from imprisonment and order his removal to a State asylum, where he shall remain until restored to his right mind, when the superintendent of the asylum shall inform said judge and district attorney of the fact, so that the prisoner may be, within sixty days thereafter, remanded to prison and criminal proceedings be resumed, or, if the term of imprisonment has expired, he shall be discharged.⁴ A person so far disordered in his senses as to endanger his own person, or the person and property of others, may be, by any two justices of the peace of the city or town where he may be found, upon the application of the overseer of the poor of such city or town, or county superintendent of the poor, or upon their own view,

¹ Code Crim. Pro., § 658.

² Code Crim. Pro., § 659.

³ Code Crim. Pro., § 661; see Laws 1874, chap. 446, § 20.

⁴ 2 R. S. (5th ed.), 893; id. (6th ed.), 846; 3 id. (7th ed.), 1908; Laws 1874, chap. 446.

or on the information or oath of others, by warrant, direct the confinement of such person in such secure place as may be provided by said overseers of the poor, which place may be the jail, where such person may be confined not more than ten days.¹

6. *United States Prisoners.*

The keeper of each county prison shall receive therein every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and confine such person in the prison until he shall be duly discharged, and shall also receive therein and safely keep, any criminal convicted of any offense against the United States, sentenced to imprisonment therein, by any court of the United States sitting in this State.²

7. *Discharge.*

The commitment in each case should show the period during which the prisoner should be confined, and the conditions, if any, upon which he should be released, and this, with what has already been said in regard to commitments, together with what has been said in regard to bail, will indicate sufficiently when a prisoner should be discharged, either upon compliance with some requirement, named in the commitment, upon expiration of this term of sentence, or upon giving bail. A prisoner may, however, in certain cases be discharged on *habeas corpus*, which will be spoken of in another place. And it is also provided by statute, that within twenty-four hours after the discharge of any grand jury, by any Court of Oyer and Terminer, or court of general sessions of the peace, it shall be the duty of such court to cause every person confined in any jail or other county prison, penitentiary or house of detention, in the county, upon any criminal charge, and not indicted, to be discharged without bail, unless satisfactory cause shall be shown to such court, for detaining such person in custody, or upon

¹ 2 R. S. (5th ed.), 883, 884; 2 R. S. (6th ed.), 842, 845; 3 id. (7th ed.), 1899, 1901.

² 3 R. S. (5th ed.), 1099; id. (6th ed.), 1105; id. (7th ed.), 2590, 2591, 2623.

bail, as the case may require, until the meeting of the next grand jury in such county.¹

8. *Grand Jury's Inquiry and Inspection*

It is made the duty of grand juries to inquire into the case of every person imprisoned in the jail of the county on a criminal charge, and not indicted, and to also inquire into the condition and management of the public prisons in the county, and they are entitled to free access thereto, at all reasonable times.²

9. *Returning List of Prisoners, etc.*

The keeper of every jail or other county prison, penitentiary, or house of detention, shall present to every Court of Oyer and Terminer, and to every court of sessions held in the county, at the opening of such court, a calendar, stating : 1. The name of every person then detained in such prison, 2. The time when such prisoner was committed, and by virtue of what process or precept ; and, 3. The cause of the detention of every such person.³ Mr. Crocker, in his excellent work on sheriffs, says that this list need not contain the names of prisoners then in jail under sentence,⁴ and although this may be the intent of the statute, it certainly does not come within the letter, and a strict and full compliance is advised.

10. *Stay on Appeal.*

Where an appeal is taken from a judgment of conviction, and the defendant be in the custody of the sheriff, he must, if the requisite certificate be given upon such appeal, upon being served with a copy of the order, directing a stay of execution, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment upon the appeal,⁵ provided, of course, he is not discharged upon bail, pursuant to law ; and where, on appeal and stay

¹ 3 R. S. (5th ed.), 1066; id. (6th ed.), 1067; id. (7th ed.), 2593.

² Code Crim. Pro., §§ 260, 261.

³ 3 R. S. (5th ed.), 1066; id. (6th ed.), 1066; id. (7th ed.), 2593.

⁴ Crocker on Sheriffs, § 262.

⁵ Code Crim. Pro., § 30.

thereon, execution of the judgment have commenced, the further execution is suspended, and the defendant must be restored to his original custody.¹

SECTION VII.

THE DEATH PENALTY.

1. *The Warrant.*

When a defendant is sentenced to the punishment of death, the judge or judges holding the court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the sheriff of the county, a warrant, stating the conviction and sentence, and appointing the day upon which the sentence must be executed.² The day so appointed must be not less than four weeks, and not more than eight weeks after the sentence.³

When New Day Fixed.—Whenever, for any reason, other than insanity and pregnancy, a defendant, sentenced to the punishment of death, has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or the judgment inflicting the punishment stands in full force, the Supreme Court, or a justice thereof, upon application by the attorney general, or of the district attorney of the county where the conviction was had, must make an order, directed to the sheriff, commanding him to bring the convict before a general term of the Supreme Court in the department, or a term of a Court of Oyer and Terminer in the county where the conviction was had. If the defendant be at large, a warrant may be issued by the Supreme Court, or a justice thereof, directing any sheriff or other officer to bring the defendant before such court at general term, or Oyer and Terminer aforesaid; and upon the defendant being brought before the court, it must inquire into the circumstances, and if no legal reason exists against the execution

¹ Code Crim. Pro., § 531.

³ Code Crim. Pro., § 492.

² Code Crim. Pro., § 491.

of the sentence, it must issue its warrant to the sheriff of the proper county, under the hands of the judge or judges, or of a majority of them, of whom the judge presiding must be one, commanding the sheriff to do execution of the sentence, upon a day appointed therein. The warrant must be obeyed by the sheriff accordingly.¹

2. *Reprieve; or Suspension of Execution.*

By Governor.—The governor may pardon a defendant sentenced to the punishment of death, or reprieve or commute such sentence, except in case of treason,² and such power, or the power to reprieve or suspend the execution, exists no where else, except in case of a stay of proceedings upon an appeal or writ of error, and where the sheriff is authorized to suspend execution as hereinafter specified.³ Where a pardon is granted by the governor, it takes effect so that the recipient of executive clemency cannot be deprived of its benefit, when such pardon is signed by the executive, properly attested, and authenticated by the State seal, and delivered either to the recipient or to some one in his behalf;⁴ and such pardon is valid, when granted by one *de facto* governor, without regard to his legal title to the office.⁵ The governor may suspend execution of sentence for treason until the next session of the legislature, when the legislature may pardon, commute, direct execution of sentence or grant further reprieve.⁶

Appeal or Writ of Error.—Upon an appeal to the Supreme Court from a judgment of conviction, the execution of the judgment of death is stayed, of course.⁷ And upon an appeal to the Court of Appeals, from a judgment of the Supreme Court, affirming a conviction, the execution of the judgment of death is stayed, of course, by such appeal.⁸

When Defendant Insane.—If there is reasonable ground to believe that the defendant has become insane, the sheriff of the county in which he was convicted, with the concurrence of a justice of the Supreme Court, or the county judge

¹ Code Crim. Pro., §§ 503, 504.

² Code Crim. Pro., § 692.

³ Code Crim. Pro., § 495.

⁴ *Ex parte*, Reno, 66 Mo., 266.

⁵ *Ex parte*, Morris, 8 S. O., 403.

⁶ Code Crim. Pro., § 693.

⁷ Code Crim. Pro., § 527.

⁸ Code Crim. Pro., § 528.

of the county, who may make an order to that effect, must impanel a jury of twelve persons of that county, qualified to serve as jurors in a court of record, to examine the question of the sanity of the defendant. The sheriff must give at least seven days notice of the time and place of the meeting of the jury to the district attorney of the county. The impaneling of the jury, and the proceedings upon the inquisition, are regulated by section 108 of the Code of Civil Procedure, under which the title to property seized by a sheriff, and claimed by a third person, is tried, and which is spoken of elsewhere.¹ This inquiry must be attended by the district attorney, who may produce witnesses, and for that purpose has the same power to issue subpoenas as for witnesses to attend a grand jury.² The finding of the jury must be in the form of an inquisition, signed by them and by the sheriff; and if it be found thereby that the defendant is insane, the sheriff must suspend execution of the warrant until he receives the governor's warrant directing that the defendant be executed.³ The sheriff must immediately transmit the inquisition to the governor, who, as soon as he is satisfied of the sanity of the defendant, or of his restoration to sanity, must issue his warrant, appointing a time and place for the defendant's execution, pursuant to his sentence, unless the sentence is commuted or the convict pardoned, and may, in the meantime, give directions for the disposition and custody of the defendant.*

When Pregnant.—If there is reasonable ground to believe that a female defendant is pregnant, the sheriff of the county where the conviction took place must impanel a jury of six physicians to inquire into her pregnancy, and the proceedings thereon and regulating the impaneling of the jury are the same as in the case of the supposed insanity of defendant, except that the sheriff may require one or more of the physicians composing the jury to attend from an adjoining county, and a physician acting as such juror need not be qualified to serve as a juror in a court of record.⁴ The finding of the jury must be by inquisition, signed by

¹ Code Crim. Pro., § 496.

⁴ Code Crim. Pro., § 499.

² Code Crim. Pro., § 497.

⁵ Code Crim. Pro., § 500.

³ Code Crim. Pro., § 498.

them and by the sheriff, and if such inquisition find that the defendant is quick with child, the sheriff must suspend the execution of the warrant until he receives the governor's warrant directing its execution ;¹ and must immediately transmit the inquisition to the governor, who, as soon as he is satisfied that the defendant is no longer quick with child, may issue his warrant, appointing a time and place for her execution, pursuant to her sentence, or may commute her punishment to imprisonment for life.²

3. *How Executed.*

The punishment of death must, in every case, be inflicted by hanging the convict by the neck until he is dead ;³ and this must be done within the walls of the prison of the county in which the conviction took place, or within a yard or inclosure adjoining thereto, and by the sheriff of such county, unless, in any county, there is not a county jail for the confinement of criminal prisoners, or the jail has become unfit or unsafe for the confinement of prisoners, or is destroyed by fire or otherwise, and the county judge of the county has, according to law, designated the jail of a contiguous county for the confinement of the prisoners of the county ; when the sheriff of the county, where the convict is confined, must attend, upon the day appointed for the execution of the sentence, at the jail of his county, and there conduct the proceedings and execute the sentence, in all respects, as if the jail were situated in the county where the conviction took place.⁴ The prison here spoken of is the jail appointed by law for the confinement of convicts awaiting execution of their sentence.⁵

Who to be Present.—It is the duty of the sheriff or under sheriff of the county to be present at the execution, and to invite the presence, by at least three days previous notice, of the county judge, district attorney, clerk and surrogate of the county, together with two physicians, and twelve reputable citizens of full age, to be selected by the sheriff or under sheriff. The sheriff or under sheriff must, at the request of the criminal, permit such ministers of the gospel,

¹ Code Crim. Pro., § 501.

² Code Crim. Pro., § 502.

³ Code Crim. Pro., § 505.

⁴ Code Crim. Pro., §§ 506, 509.

⁵ Code Crim. Pro., § 506.

priests or clergymen of any denomination, not exceeding two, and such of the immediate relatives of the convict as he desires, being of full age, to be present at the execution; and such officers of the prison, deputy sheriffs and constables and marshals must attend, as the sheriff or under sheriff deems expedient to have present. Besides the persons above designated, no one shall be permitted to be present at the execution.¹

Certificate of Execution.—After the execution of sentence, the sheriff or under sheriff attending, must prepare and sign a certificate, setting forth the time and place of the execution, and that the convict was then and there executed in conformity to the sentence of the court and the provisions of the Code of Criminal Procedure, which certificate must also be signed by the county judge, surrogate and district attorney, if they were present, and by the physicians and citizens selected by the sheriff who witnessed the execution; and must cause such certificate to be filed in the office of the clerk of the county.²

SECTION IX.

SUBPŒNAS IN CRIMINAL ACTIONS AND IN PROCEEDINGS OF A CRIMINAL NATURE.

1. *Preliminary to Warrant, and on Examination Before Magistrate.*

Upon the information before a magistrate, and after the examination of the informant, such magistrate may issue a subpœna for witnesses in support of the charge made, before he issues a warrant;³ and, after the arrest, upon the examination, the magistrate may issue subpœnas either on the part of the people, or of the defendant; and, if the defendant requests it, must issue a subpœna for the witnesses examined on the taking of the information, for cross-examination, if they be in the county. Such subpœnas must be subscribed by the magistrate.⁴

¹ Code Crim. Pro., § 507.

² Code Crim. Pro., § 508.

³ *The People v. Hicks*, 15 Barb., 153; *Blodgett v. Race*, 18 Hun, 133.

⁴ Code Crim. Pro., §§ 194, 608.

2. *On Trials other than on Indictment, and in Special Proceedings of a Criminal nature.*

On trials without the intervention of a grand jury, by police courts or courts of special sessions, or other courts of inferior or local jurisdiction, having authority to try, such court may issue subpoenas for witnesses on the part of the people or the defendant, subscribed by the officer presiding or holding the court;¹ and in all special proceedings of a criminal nature, all courts and magistrates having before them such proceedings, may issue subpoenas in the same manner, for witnesses for or against the defendant.²

3. *By District Attorney.*

The district attorney of the county may issue subpoenas, subscribed by him, for witnesses within the State, in support of the prosecution or for such other witnesses as the grand jury may direct, to appear before the grand jury upon an investigation pending before them;³ and may also issue such subpoenas, in support of an indictment, for witnesses within the State, to appear before the court at which it is to be tried.⁴

He may also, whenever it is necessary to send subpoenas into a foreign county for witnesses on criminal process, send them to the sheriff of the county where the witnesses reside, when it shall be the duty of such sheriff to serve the same, and make his return to such district attorney without delay.⁵

4. *By Clerk of Court.*

The clerk of a court at which an indictment is to be tried, must, at all times, upon the application of the defendant, and without charge, issue as many blank subpoenas, under the seal of the court, and subscribed by him as clerk, for witnesses within the State, as may be required by the defendant.⁶

¹ Code Crim. Pro., § 729.

² Code Crim. Pro., § 953.

³ Code Crim. Pro., § 609.

⁴ Code Crim. Pro., § 610.

⁵ Laws 1836, chap. 506, § 4; 3 R. S. (7th ed.), 2580.

⁶ Code Crim. Pro., § 611.

5. *Form of Subpœna.*

It is provided by the Code of Criminal Procedure, that such subpœnas must be in substantially the following form:

“In the name of the people of the State of New York :

To A. B.

“You are commanded to appear before C. C., *a justice of the peace of the town of* , (or ‘the grand jury of the county of ,’ or ‘the court of sessions of the county of ,’ or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action, prosecuted by the people of the State of New York, against E. F.

“Dated at the town of (as the case may be), the day of , 18 .

“G. H., justice of the peace,” (or ‘I. K., district attorney,’ or ‘by order of the court.’

“L. M., clerk (as the case may be).”¹

In a special proceeding of a criminal nature, instead of the words in this form, “in a criminal action prosecuted,” the words “in a special proceeding instituted,” or words to that effect may be substituted.

If books, papers or documents be required, a direction to the following effect must be contained in the subpœna: “And you are required, also, to bring with you the following (describing intelligibly the books, papers or documents required).”²

6. *When and How to be indorsed.*

Whenever any magistrate shall issue any subpœna, in any criminal proceeding or trial, he shall indorse upon the back thereof, a memorandum, showing whether the same was issued for the people, or for the prisoner; although this indorsement or its omission does not affect the subpœna, so far as the officer is concerned, it is a requirement of the statute that should be known.³

7. *On Examination of Witnesses Conditionally.*

On the examination of witnesses conditionally, as pre-

¹ Code Crim. Pro., § 612.

² Code Crim. Pro., § 613

³ Laws 1845, chap. 180, § 18; 3 R. S. (7th ed.), 2548.

scribed by the Code of Criminal Procedure, the attendance of the witness may be enforced, by a subpœna subscribed by the officer taking the examination, or issued under the seal of the court,¹ the form of which would be substantially as before given.

8. *By Whom and how Served—Proof of.*

A peace officer must serve, in his county, city, town or village, as the case may be, any subpœna delivered to him for service, either on the part of the people or of the defendant, and must make a written return of the service, subscribed by him, stating the time and place of service, without delay. A subpœna may, however, be served by any other person.² If served by any other person other than a peace officer, it must be a person of suitable age and discretion.

The service of the subpœna is made by delivering it, or by showing it, and delivering a copy thereof to the witness personally.³ The witness is entitled to no fees upon the service.

The proof of service, if by a peace officer, is a written return as just stated, which may be in the form of a certificate; in the case of any other person the proof should be by affidavit.

It is gathered from these provisions, that there may be in any action or proceeding, either one original subpœna, containing the names of all the witnesses, in which case service is made by showing this original to each witness, and delivering a copy, and the return or proof of service is made on the original; or an original subpœna and a copy for each witness, in which case service is made by delivering the original to the witness, and the return or proof is made on the copy.

9. *Witnesses out of the County.*

No person is obliged to attend as a witness, before a court or magistrate out of the county where the witness resides, or is served with the subpœna, unless the judge of

¹ Code Crim. Pro., § 634.

² Code Crim. Pro., § 614.

³ Code Crim. Pro., § 615.

the court, in which the crime is triable, or a judge of the Supreme Court, or a county judge, or in the city of New York, the recorder or city judge, or judge of the general sessions of that city, upon an affidavit of the prosecutor or district attorney, or of the defendant or his counsel, stating that he believes that the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.¹

¹ Code Crim. Pro., § 618.

CHAPTER IV.

OF THE SERVICE AND RETURN OF PROCESS IN A CIVIL ACTION,
AND HEREIN OF EXECUTIONS AND LEVY AND SALE THERE-
UNDER.

SECTION I.

OF THE SERVICE AND RETURN GENERALLY; AND ESPECIALLY
OF THE SUMMONS, SUBPŒNA, ETC.

1. *Duties and Responsibilities as to Service.*

Generally.—The law imposes various duties upon sheriffs and other ministerial officers, on delivering to them the process of courts of general or limited jurisdiction, or the warrants of officers, to the discharge of which they are *absolutely bound* provided there is jurisdiction; and though there be a total want of such jurisdiction, if it be not apparent on the face of the process, the law will not put them to inquire and judge of the case. In general, they ought not to look beyond the process, and in no case need they do so. Process in due form, issued by a competent tribunal, or officer authorized to act in that regard, will afford complete protection to the officer charged with its execution, if he act under it according to law; and so, too, as to those who act in aid of the officer. The taking of indemnity does not deprive him of the protection which his process affords, nor would knowledge by him of a want of jurisdiction, deprive him of its protection, so be it that the process is fair on its face. He must be governed and he is protected by the process; and he cannot be affected by

anything which he has heard or learned outside of it.¹ He may not, however, build up for himself *a title* under process, unless it be well and properly issued in law.² If an execution, duly directed and fair on its face, is delivered to him, whereby he is commanded to take the body of defendant, if he can find no property, his duty is to proceed at once as directed; he need not inquire whether such execution was proper to be used in that particular case. If the court has erroneously issued it, still it protects him, however it may affect the court or the plaintiff in the execution.³ But he should, before proceeding to execute the same, ascertain if such process is in due form, and is regular upon its face; if the process is void upon its face, if it contain anything showing any defect of jurisdiction in the court or officer issuing it, either of the subject matter or of the person, the officer, if he attempts to execute it, will be a trespasser.

Whether the sheriff is *bound* to execute an erroneous writ delivered to him, depends upon the question whether it is absolutely void, or only voidable; and whether void or voidable, depends upon the fact whether it is amendable. A process is absolutely void for want of jurisdiction in issuing it; and although the sheriff has the *right* to execute it if fair on its face, he is under no legal obligation to do so, and its invalidity is *always* a good answer to an action brought against him for refusing to execute it. A process is voidable from an irregularity in the manner of issuing it, or in the manner of entering the judgment upon which it was issued, or from any other irregularity. Such process is valid until it is set aside, and its voidability is *never* a good answer to an action brought against him for refusing to exe-

¹ *Arrex v. Brodhead*, 19 Hun, 269; *Earl v. Camp*, 16 Wend., 562; *People v. Warren*, 5 Hill, 440; *Hudler v. Golden*, 36 N. Y., 446; *The Troy etc. R. R. Co. v. Kane*, 72 id., 614; *Shaw v. Davis*, 55 Barb., 389; *Doolittle v. Doolittle*, 31 Barb., 312; *Laudt v. Hilts*, 19 id., 283; *Elder v. Morrison*, 10 Wend., 128; *Webber v. Gay*, 24 id., 485; *Savacool v. Boughton*, 5 id., 117; *Watson v. Watson*, 9 Conn., 440; *Horton v. Hendershot*, 1 Hill, 118. But see *Grace v. Mitchell*, 31 Wis., 533.

² *Arrex v. Brodhead*, 19 Hun., 269; *Dunlap v. Hunting*, 2 Denio, 643; *Earl v. Camp*, 16 Wend., 562; *Horton v. Hendershot*, 1 Hill, 118.

³ *Savacool v. Boughton*, 5 Wend., 171.

cute it.¹ If the defects are amendable—and all but jurisdictional defects are amendable—it matters not whether the defects are apparent on the face of the process or not, the officer is protected by and must execute the process.² But in an action for damages against a sheriff for his acts done under an unconstitutional or void enactment, he cannot justify under such enactment.³

A sheriff is bound to use all reasonable endeavors to execute process, and, if it require him to arrest a party, he should go to his house to ascertain if he is at home, and, if not, to learn where he is—particularly where he lives in his immediate neighborhood; and if, instead of pursuing that course, he rely upon the vague information obtained from casual inquiries in the street that the party is not at home, he does it at his peril.⁴ He is not bound, however, to start on the instant of receiving process, to execute it, without regard to anything else.⁵ When he seizes property, he must exercise ordinary diligence in taking care of the property he has in trust, which is the care that every person of common prudence, and capable of governing a family, takes of its own concerns. He is liable otherwise.⁶ The party in whose favor process issues, may give such express instructions to the sheriff as will not only excuse him from his general duty, but bind him. Both the process and the law which convey authority under it, are for the benefit of the party in whose behalf it is issued; and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection. It follows that he may qualify it, to a greater or less extent, according to his discretion. These instructions the sheriff is *bound* to obey, so long as they are within his general powers and duties.⁷

¹ Bacon v. Cropsey, 7 N. Y., 195; Cornell v. Barnes, 7 Hill, 35; Parmelee v. Hitchcock, 12 Wend., 96; Elliot v. Cronk, 13 id., 35; German v. Swartwout, 3 id., 282; Housh v. People, 75 Ill., 487; Richards v. Nye, 5 Oreg., 382.

² Dominick v. Eacker, 3 Barb., 17; Foster v. Wiley, 27 Mich., 244; Fall Creek, etc., Co. v. Smith, 71 Penn. St., 230.

³ Sumner v. Beeler, 50 Ind., 341.

⁴ Hinman v. Borden, 10 Wend., 367.

⁵ Whitney v. Butterfield, 13 Cal., 335.

⁶ Moore v. Westervelt, 27 N. Y., 234; S. C., 21 id., 103.

⁷ Root v. Wagner, 30 N. Y., 9; Walters v. Sykes, 22 Wend., 566; Godfrey v. Gibbons, id., 569.

Thus the owner of a judgment against two or more defendants may direct the amount on execution, or anything less than the amount, to be made out of the property of any or either of the defendants. But, in the absence of express instructions, the authority to be implied from the fact that a party causes process to be issued, and sets the proper officers in motion in the execution thereof, is simply an authority co-extensive with that conferred by the process; *i. e.*, to do lawful acts pursuant thereto.¹ Thus, if an officer to whom a warrant is issued, directing him to seize the goods of A., take the goods of B. an authority so to do from the principal in the proceedings, will not be implied, and he cannot be made liable therefor. If, however, the party in whose name and for whose benefit a trespass is committed, with full knowledge of the facts sanction the act, and appropriate the proceeds of the trespass, it is evidence for the jury, from which they may infer a previous command or authority.²

To give Minute of Mandate, and Copy.—A sheriff, to whom a mandate of any description is delivered to be executed, must, without compensation, give to the person delivering the same, if required, a minute in writing, signed by the sheriff, specifying the names of the parties, the general nature of the mandate, and the day and hour of receiving the same.³ And a sheriff or other officer, serving a mandate, must, upon the request of the person served, deliver to him a copy thereof, without compensation, unless he is expressly allowed by law to charge a fee therefor.⁴ His willful omission to do either is punishable as a misdemeanor.⁵ And if it be a process upon which he may detain the person served, and he refuses to deliver a copy thereof if one is demanded, and the fee tendered therefor, he shall forfeit \$200 to the person so detained.⁶

A sheriff, or other officer, to whom is delivered for service

¹ *Welsh v. Cochran*, 63 N. Y., 811.

² *Welsh v. Cochran*, 63 N. Y., 181; *Vanderbilt v. Richmond Turnpike Co.*, 2 id., 479; *Brainerd v. Dunning*, 30 id., 211; *Fox v. Jackson*, 8 Barb., 355.

³ Code Civ. Pro., § 100.

⁴ Code Civ. Pro., § 101.

⁵ Penal Code, § 154.

⁶ 3 R. S. (5th ed.), 892, § 88; id. (6th ed.), 883, § 88.

or execution a mandate, authorized by law to be issued, by a judge or other officer, in a special proceeding, who willfully neglects to execute the same, may be fined by the judge, in a sum not exceeding twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby.¹

Process, how Executed.—A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision, he is liable to the party aggrieved, for the damages sustained by him, in addition to any fine, or other punishment or proceeding, authorized by law.²

Omitting or Delaying Duty.—A sheriff may not ask or receive any emolument, gratuity or reward, or any promise of any emolument, gratuity or reward, for omitting or deferring the performance of any official duty. If he do, he is guilty of a misdemeanor.³ And where any duty is or shall be enjoined by law upon him, every willful omission to perform such duty, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.⁴ And if he, or any other officer, under the pretense or color of any process or other legal authority, arrest any person, or detain him against his will, or seize or levy upon any property, or dispossess anyone of any lands or tenements, or does any other act, whereby another person is injured in his person, property or rights, without a regular process or other lawful authority therefor, he is guilty of a misdemeanor.⁵

Process, When Executed.—All service of legal process of any kind whatever, upon the first day of the week, is prohibited, except in cases of a breach of the peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or except

¹ Code Civ. Pro., § 103.

² Code Civ. Pro., 102; *People v. Bernal*, 43 Cal., 385.

³ Penal Code, §§ 49, 58.

⁴ Penal Code, §§ 154, 116, 117.

⁵ Penal Code, §§ 119, 556.

.. where such service is specially authorized by statute.¹ All the time from midnight unto midnight is included in the term day, as employed in the phrase "first day of the week."² And whoever maliciously procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action, to which such person is a party, to be adjourned to that day for trial, is guilty of a misdemeanor.³ But a judgment rendered on that day in such action would not be void, and the sheriff would not be excused from executing process on such judgment, if it be valid otherwise.⁴ Whenever any general or town election shall be held in any city or town, other than for militia officers, no declaration, by which a suit shall be commenced, or any civil process, or proceeding in the nature of civil process, shall be served on any elector entitled to vote in such city or town, on the day on which such election or town meeting shall be held.⁵ Otherwise, than above stated, in any civil or criminal action or proceeding, process may be served on any day, and at any time of day or night;⁶ and anywhere within the territory, within which the officer has jurisdiction. No particular place will protect a man from having process served upon him. His own house is not his sanctuary, if the officer can obtain peaceable and forceless entrance. Civil process may be served on a convict in States prison.⁷ However the mere opening of the door of defendant's dwelling house, if without his consent, is

¹ Penal Code, §§ 262, 268; *Butler v. Kelsey*, 15 Johns., 177; *Field v. Park*, 20 id., 140; *Van Vechten v. Paddock*, 12 id., 178; *Hotailing v. Osborn*, 15 id., 119; *Story v. Elliot*, 8 Cow., 27.

² Penal Code, § 261.

³ Penal Code, § 271.

⁴ *Maxson v. Annas*, 1 Denio, 201.

⁵ 1 R. S. (5th ed.), 418, § 3; id. (6th ed.), 427, § 4; 1 R. S. (5th ed.), 819, § 22; id. (6th ed.), 827, § 31.

⁶ *Allen on Sheriffs*, 118; *Horn v. Perry*, 11 W. Va., 694; but see for Kentucky, *Paul v. Bruce*, 9 Bush (Ky.), 317; for Penn., *Black v. John*, 68 Penn. St., 83; *Eby's Appeal*, 70 Penn. St., 311; for S. C., *State v. Thockam*, 1 Bay, 358.

⁷ *Davis v. Duffie*, 3 Keyes, 606; S. C.; 1 Abb. App. Dec., 486; 8 Bosw., 617; 18 Abb. Pr., 360.

forceful, and process served thereby is irregular.¹ The service on every defendant is a several service; and on a writ against two, the body of one may be arrested, and the property of the other attached.² If a person declines to receive from an officer, a paper presented for service, the officer may deposit it in any convenient place, in the presence of the party, and the service will be good.³

A sheriff is not bound to obey or to notice any injunction or other order restraining him, or commanding him not to execute process duly directed and delivered to him, unless such order is regularly served upon him. Then he must obey it, and he will be protected in his obedience to it, as in acting under any other court process. If he has, before such service, under and by virtue of his process, seized either person or property, neither are by such service released, but he may, if the case be proper therefor, take bail for the person; and an inventory of and a receipt for the property, or he may retain it in his possession; but he cannot sell or otherwise finally dispose of the property, until an order, dissolving or vacating the stay, is duly entered. And he need not proceed under the process, until the order, vacating or dissolving the stay, is regularly served upon him.

To Command Power of County.—If a sheriff, to whom a mandate is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command all the male persons in his county, or as many as he thinks proper, and with such arms as he directs, including any military organization armed and equipped, to assist him in overcoming the resistance, and, if necessary, in arresting and confining the resisters, their aiders and abettors, to be dealt with according to law.⁴

The sheriff must certify to the court, from which or by whose authority the mandate was issued, the names of the resisters, their aiders and abettors, as far as he can ascertain the same, to the end that they may be punished for

¹ *Mason v. Libbey*, 51 How. Pr., 436; 1 Abb. N. C., 354; *Snydacker v. Brosse*, 51 Ill., 357.

² *Connor v. Madden*, 57 Me., 410.

³ *Norton v. Meader*, 4 Sawyer, (U. S.), 603.

⁴ Code Civ. Pro., § 104; *Coyles v. Hurtin*, 10 Johns, 85; *State v. Moore*, 39 Conn., 244.

their contempt of the court.¹ Any person thus commanded by the sheriff, to assist him, who, without lawful cause, refuses or neglects to obey the command, is guilty of a misdemeanor.² If a constable to whom a mandate, issued by a justice of the peace, is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may deliver it to the sheriff of the county, with a written certificate, stating the facts, and requiring the sheriff to execute it. Thereupon the sheriff must execute the mandate, and he is subject to all the liabilities attaching to a constable in executing it. Sections 104, 105 and 106 of the Code of Civil Procedure apply to a mandate thus delivered to the sheriff.³ The authority of the sheriff is a justification for those who assist him when commanded. If he act, without authority, they, assisting him, become trespassers as well as himself. But if a person come in aid of a sheriff in doing a lawful act, and the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the one aiding does not thereby become a trespasser. Whenever a sheriff has power to execute process in a particular manner, his authority is a justification to himself, and to all who come to his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act, they are not bound to obey, either by the common law or by the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one.⁴ If it appears to the governor, that the power of a county will not be sufficient to enable the sheriff thereof to serve or execute the process or other mandates, delivered to him, he must, on the application of the sheriff, order

¹ Code Civ. Pro., § 105.

² Code Civ. Pro., § 106.

³ Code Civ. Pro., § 3158.

⁴ *Elder v. Morrison*, 10 Wend., 128; *Cro. Eliz.*, 181; *Cro. Car.*, 446; *Oystead v. Shed*, 12 Mass., 511; *Leonard v. Stacey*, 6 Mod., 140.

such a military force, from another county or counties, as is necessary.¹

Where the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county, by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation, to be published in the State paper, and in such papers in the county as he may direct, declare the county to be in a state of insurrection.² After such proclamation the governor may order, into the service of the State, such number and description of volunteer or uniform companies, or other militia of the State, as he deems necessary, to serve for such term, and under the command of such officer or officers as he may direct.³ And, when he thinks proper, he may revoke such proclamation, or declare that it shall cease, at the time and in the manner directed by him.⁴

In the service of process, with few exceptions, which will be pointed out in this work in their proper places, the powers of a sheriff, *as such*, are confined within the limits of his county. When process is delivered him, which does not require the arrest of the defendant or the seizure of his property, he should execute it according to the command thereof, whether regular or not.

2. *Of the Service of the Summons.*

Who may Serve.—The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made; in that case, the service cannot be made afterwards. Where a summons is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it, and return

¹ Code Civ. Pro., § 107.

² Code Crim. Pro., § 115.

³ Code Crim. Pro., § 116.

⁴ Code Crim. Pro., § 117.

it, with proof of service, to the plaintiff's attorney, with reasonable diligence.¹

As any person may serve a summons, the sheriff may serve it at any place within the State. But when he makes the service without his county, he does it, not in his official capacity, but as a private individual.

How Served upon Individuals.—Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the State, as follows:

1. If the defendant is an infant, under the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the State, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

2. If the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee has been appointed, to the committee, and also to the defendant in person.

3. If the action is against a sheriff, for a cause specified in section 158 of the Code of Civil Procedure, by delivering it to the defendant in person, or to his under sheriff in person, or at the office of the sheriff, during the hours when it is required by law to be kept open, to a deputy sheriff or a clerk in the employment of the sheriff, or other person in charge of the office.

4. In any other case, to the defendant in person.²

Infants and Lunatics.—If the defendant is an infant of the age of fourteen years or upwards, or if the court has, in its opinion, reasonable ground to believe that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated

¹ Code Civ. Pro., § 425.

² Code Civ. Pro., § 426, as amended (Laws 1879; chap. 542, p. 601).

in the order, and that service of summons shall not be deemed complete until it is so delivered.¹

In a case specified in subdivision first or second of section 426, Code of Civil Procedure, where the court has, in its opinion, reasonable ground to believe, that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason, he is not a fit person to protect the rights of the defendant, it may likewise make an order, as prescribed in the last section. In a case specified in subdivision second, the court may, as a part of the same order, or by a separate order, made, in like manner and upon like ground, at any stage of the action, appoint a special guardian *ad litem* to conduct the defense for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.²

Where the defendant has been judicially declared to be incompetent to manage his affairs, in consequence of lunacy, and it appears satisfactorily to the court, by affidavit, that the delivery of a copy of the summons to him, in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make an order, dispensing with such delivery. In that case, a delivery of a copy of the summons, to a committee duly appointed for him, is sufficient personal service upon the defendant.³

Where an infant defendant resides within the State, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian *ad litem*, unless he, or some one in his behalf, procured such guardian to be appointed, as prescribed in sections 471 and 472 of the Code of Civil Procedure, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where a summons is served without the State upon an adult defendant, pursuant to an order for

¹ Code Civ. Pro., § 427.

³ Code Civ. Pro., § 429.

² Code Civ. Pro., § 428.

that purpose, granted as prescribed in section 438 of said Code, except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service.¹

A summons must be served upon a minor precisely as on an adult. But a minor cannot make an acknowledgment of the service, nor can his guardian, or the one with whom he resides, do so for him.² Process may be served on two minor defendants by serving them as an adult would be served, and by leaving a copy with their mother, as a member of the family of each.³

Designation by Adults.—A resident of the State, of full age, may execute, under his hand, and acknowledge, in the manner required by law, to entitle a deed to be recorded, a written designation of another resident of the State, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court, or before any officer, during the absence from the United States of the person making the designation; and may file the same with the written consent of the person so designated, executed and acknowledged, in the same manner, in the office of the clerk of the county where the person making the designation resides. The designation must specify the occupation, or other proper addition, and the residence of the person making it, and also of the person designated: and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked, earlier by the death or legal incompetency of either of the parties thereto, or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent or revocation, and must note, upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, as prescribed herein, a summons, or any process or other paper for the commencement of a civil special pro-

¹ Code of Civ. Pro., § 473.

² Kansas City, etc, R. R. Co. v. Campbell, 62 Mo., 585; De La Hunt v. Holderbaugh, 58 Ind., 285.

³ Weber v. Weber, 49 Mo., 45.

ceeding, against the person making it, in any court, or before any officer, may be served upon the person so designated, in like manner and with like effect as if it was served personally upon the person making the designation, notwithstanding the return of the latter to the United States.¹

In all legal proceedings against the board of supervisors, the first process, and all other proceedings required to be served, shall be served on the chairman or clerk of the board of supervisors.²

Personal Service.—The service of a summons is sufficient if it “be by delivering a copy of the summons to the defendant personally;” and the copy summons is sufficient, if said copy contain everything put in the summons, or on it, by the clerk. It is not necessary, in such a case, that the copy should be certified, or that it should contain any indorsement put on the summons by the sheriff.³ And if he is actually and voluntarily within the State at the time of service, it is indifferent where his permanent residence is.⁴

Time and Manner of Service. In making service of a summons, the provisions of the statute must be substantially observed and followed by the officer.⁵ A mere manual delivery of the summons is not a good service, if the defendant hand back the papers, and they are received, without informing him of his rights.⁶ And service made by violently thrusting the process upon the person of the defendant, is void, although the officer making the service, may have stated the nature of the process, and the person on whom they were intended to be served, may have refused to receive them. Service should be effected in all cases without personal violence or incivility; and this is demanded by the dignity of the court, issuing the process, as well as by the high privilege of personal immunity, which every individual has the right to insist upon. If a party refuse to accept

¹ Code Civ. Pro., § 430.

² 1 R. S. (5th ed.), 901, § 3; 2 id. (7th ed.), 977, § 3.

³ Dresser v. Wood, 15 Kan., 344; Buck v. Buck, 60 Ill., 105; Hammond v. Olive, 44 Miss., 543; Grosvenor v. Henry, 27 Iowa, 269.

⁴ Peabody v. Hamilton, 106 Mass., 217; Reeder v. Holcomb, 105 Mass., 93; Carter v. Daisy, 42 Miss., 501.

⁵ People v. Bernal, 43 Cal., 385; Crary v. Barber, 1 Col. T., 172; Black v. Johns, 68 Penn St., 83.

⁶ Beekman v. Cutler, 2 Code R., 51.

papers, when decorously offered him, after being distinctly informed what they are, he should be, and will be held, to the consequences of his own perverseness. Then the officer may deposit the process or other paper in any convenient place in the presence of the party; and this will be in legal effect, a delivery of the papers to the party, and leaving them with him.¹ The service may be made anywhere within the jurisdiction of the court issuing the process, which is confined for courts of record within the limits of this State.² And it is no objection to the service of process in a civil action, that it was made upon the defendant while he was still on board a British mail steam vessel, after her arrival at the dock, but before being moored.³ Service of process in this State may be made within any reasonable time after the delivery thereof to the sheriff or other officer or person, unless the plaintiff's attorney, by an indorsement upon the process, has fixed a return day therefor. In such case, if service be made after the return day, it is a nullity.⁴

While service upon one member of a firm gives the court jurisdiction over all the members, in an action against the firm, yet service upon an alleged partner, the fact of the partnership not being established, does not confer jurisdiction upon another alleged partner.⁵

Fraudulent Service.—Where a party has been inveigled within the jurisdiction of the court by a trick, for the purpose of effecting service of a summons upon him, the service will be set aside.⁶ But so brought within the jurisdiction he may be served with process, at the suit of other creditors who

¹ Davidson v. Baker, 24 How. Pr., 39; Norton v. Meader, 4 Sawyer (U. S.), 403.

² Code Civ. Pro., §§ 426, 431, 432.

³ Peabody v. Hamilton, 106 Mass., 217.

⁴ Code Civ. Pro., § 425; see Snell v. Scott, 2 Mich. N. P., 108; Draper v. Draper, 59 Ill., 119; Baxley v. Bennett, 33 Ga., 146, Town of Peacham v. Weekes, 48 Vt., 73.

⁵ Nixon v. Downey, 42 Iowa, 78; Weaver v. Carpenter, id., 343; Anderson v. Arnette, 27 La. Ann., 237.

⁶ Metcalf v. Clark, 41 Barb., 45; Carpenter v. Spooner, 2 Sand., 717; Baker v. Wales, 3 J. and Sp., 403; S. C., 45 How. Pr., 137; *ex parte* Lagrave, id., 301; Goupil v. Simmonson, 3 Abb. Pr., 474; Hevener v. Heist, 9 Phil. (Penn.), 274.

did not participate in the fraud.¹ And where criminal process is used for the fraudulent purpose of detaining the defendant, until he can be arrested in a civil suit, he will be discharged with costs.² But one indicted in this State, and brought here by process of extradition, may be served with civil process, at the suit of a creditor who was not instrumental in procuring the extradition;³ or he may be arrested in a civil action at the suit of the prosecutor, if acquitted on the indictment, and in the absence of bad faith in procuring the extradition.⁴

Service of summons upon a defendant, without arrest, while attending court as a party or witness in another cause, will not be set aside on the ground that he is privileged from such service.⁵

Sheriff a Party.—Where the sheriff is a party defendant, the process may be executed by the coroner, who may call to his aid the power of the county in executing an order of arrest.⁶

Domestic Corporation.—Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, aldermen, and commonalty of the city of New York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the

¹ *Adriance v. Lagrave*, 59 N. Y., 110; reversing S. C., 1 Hun, 689; 4 S. C., N. Y., 415; S. C., 47 How. Pr., 71; 15 Abb. Pr., 272; *Baker v. Wales*, 45 How. Pr., 137; S. C., 14 Abb. Pr. (N. S.), 331; *Averill v. Lagrave*, 14 Abb. Pr. (N. S.), 343; see *Juneau Bank v. McSpedan*, 5 Biss. (Ohio), 64.

² *Benninghoff v. Oswell*, 37 How. Pr., 235; *Smith v. Meyers*, 1 S. C. (N. Y.), 665.

³ *Slade v. Joseph*, 5 Daly, 187.

⁴ *Browning v. Abrams*, 51 How. Pr., 172.

⁵ *Pollard v. Union Pacific R. R. Co.*, 7 Abb. Pr. (N. S.), 70.

⁶ *Holbrook v. Brennan*, 48 How. Pr., 519; *Slater v. Wood*, 9 Bosw., 15; *Avery v. Warren*, 12 Heisk. (Tenn.), 559; *Robinson v. Schmidt*, 48 Tex., 13; *Turnbull v. Thompson*, 27 Gratt. (Va.), 306.

corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.¹

Where the trustees of a religious corporation, and the officers appointed by them, were elected and appointed in conformity with the provisions of the statute, and are acting as such, they are, at least, officers *de facto*, upon whom alone a valid service of process can be made.²

The officers upon whom service may be made for a domestic corporation, are pointed out by the Code beyond mistake, unless it be that it is difficult for the officer serving to tell who is a "managing agent." Under "Foreign Corporations," "managing agents" will be treated of at large.

Foreign Corporations.—Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within that State, as follows :

1. To the president, treasurer or secretary ; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the State, as the office or residence of the person designated ; and, if it is within a city, the street and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner ; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within

¹ Code Civ. Pro., § 431 ; see *Hoen v. Atlantic, etc., R. R. Co.*, 64 Mo., 561 ; *Grubb v. Lancaster Manuf. Co.*, 10 Phil. (Penn.), 316 ; *King v. Mobile Harbor Bd.*, 57 Ala., 135 ; *Cherry v. North and South R. R. Co.*, 59 Ga., 446 ; *St. Louis, etc., R. R. Co. v. Dawson*, 3 Ill. App., 118 ; *Farmers' Ins. Co. v. Highsmith*, 44 Iowa, 330 ; *Chambers v. King Wrought-Iron Bridge Co.*, 16 Kan., 270 ; *Ruthe v. Green Bay, etc., R. R. Co.*, 37 Wis., 344 ; *Reed v. Tyler*, 56 Ill., 288 ; *R. R. Co. v. Crowe*, 9 Kan., 496 ; *Middoagh v. St. Joseph, etc., R. R. Co.*, 51 Mo., 520 ; *State v. Hannibal, etc., R. R. Co.*, id., 532 ; *R. R. Co. v. Brown*, 17 Wall. (U. S.), 445 ; *City of Sacramento v. Fowle*, 21 id., 119.

² *Berrian v. Methodist Society*, 6 Duer, 682 ; *S. C.*, 4 Abb. Pr., 424.

the State, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation within the State.¹

The service of a summons on the president of a foreign corporation is a good service, although made within the State while he was passing through it—not in any official capacity—with his family to a watering-place in another State.² But a summons served upon the president of a foreign corporation after he had resigned his office, though he did so to avoid such service, is irregular, and will be set aside.³

The “managing agent” of a corporation, upon whom process can be served, is one whose agency extends to all the transactions of the corporation; one who is invested with general power, involving the exercise of judgment and discretion, as distinguished from an ordinary agent or employee, who acts in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work, and the manner of executing the same.⁴

¹ Code Civ. Pro., § 432; see *Grover, etc., Machine Co. v. Butler*, 53 Ind., 454; *Weymouth v. Washington G. and A. R. R. Co.*, 1 McArthur (D. C.), 19; *Weight v. Liverpool, etc., Ins. Co.*, 30 La. Ann., part 2, 1186; *Union Pacific R. R. Co. v. Miller*, 87 Ill., 45; *Michigan St. Ins. Co. v. Abens*, 3 Ill. App., 488; *Ins. Co. v. Mansfield*, 43 Miss., 311; *Cunningham v. Southern Ex. Co.*, 67 N. C., 425.

² *Pope v. Terre Haute, etc., Co.*, 24 Hun, 238; Code Civ. Pro., § 1780.

³ *Ervin v. Oregon Steam Nav. Co.*, 22 Hun., 598.

⁴ *Brewster v. Michigan Central R. R., Co.*, 5 How. Pr., 183; *Reddington v. Mariposa L. and M. Co.*, 19 Hun, 405; *Flynn v. The H. R. R. Co.*, 6 How. Pr., 308; *Bank of Commerce v. Rutland and W. R. R. Co.*, 10 How. Pr., 1.

So one who is employed to take charge of a branch office, and to transfer stock and receive and transmit assessments, as directed by the corporation officers, is not a "managing agent;"¹ nor is the superintendent of a street railway, employed by a steam railroad company, to superintend the running of horse cars on a portion of the steam road not yet completed, a managing agent of such steam railroad company,² nor is an assistant secretary of a foreign railroad company, whose duty consists in making such records as he may be expressly directed to make, a "managing agent,"³

A service of a writ against a town, made upon an assistant town clerk, is not effectual.⁴

In all legal proceedings against the board of supervisors, the first process and all other proceedings, required to be served, shall be served on the chairman or clerk of the board of supervisors.⁵

Special Proceedings.—The foregoing provisions relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.⁶

Supplemental Summons.—Where the court directs a new defendant to be brought in, and the order is not made upon his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons; except that in the body thereof, it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them, as the case requires. And each provision of this chapter, relating to personal service, or a substitute for personal service of an original summons, applies to such a supplemental summons.⁷

¹ Reddington v. Mariposa L. and M. Co., 19 Hun, 405.

² Emerson v. Auburn and O. Lake R. R., 13 Hun, 150.

³ Sterett v. Denver and Rio Grande Ry. Co., 17 Hun, 316.

⁴ Fairfield v. King, 41 Vt., 611.

⁵ 1 R. S. (5th ed.), 901, § 3; id. (6th ed.), 926, § 3; 2 id. (7th ed.), 977, § 3.

⁶ Code Civ. Pro., § 433.

⁷ Code Civ. Pro., § 453; see Hancock v. Pruess, 40 Cal., 573.

Summons in an Action for a Penalty.—The summons in an action, brought by any person in his own name, to recover a penalty or forfeiture given by statute, can be served only by an officer, authorized by law to collect an execution, issued out of the same court. The summons when issued cannot be countermanded by the plaintiff before the service thereof, and immediately after it has been served, the officer, who served it, must file it, with his certificate of service, in the office of the clerk, or deliver it with a like certificate, to the magistrate by whom it was issued, as the case requires.¹ In such action, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered in the following form: "According to the provisions of," etc.; adding such a description of the statute as will identify it with reasonable certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions.² A like indorsement in a like manner must be made, if a copy of the complaint be not delivered to the defendant with a copy of the summons, in an action brought by the attorney general, or by the district attorney of the county, wherein the action is triable, to recover real or personal property that has been forfeited, or a penalty incurred, to the people of the State, or to an officer for their use, pursuant to a provision of law.³

New York Marine Court.—An order directing the service of a summons therein issued, either without the city of New York, or by publication, may be granted by the marine court, or by a justice thereof. So granted, service of the summons without that city may be made as directed in the order, either within or without the State.⁴

Yonkers City Court.—The summons in an action brought in the city court of Yonkers, may be served at any place within the county of Westchester, but not elsewhere.⁵

3. Duties of Sheriff as to Substituted Service.

Order for.—"Where a summons is issued from the Su-

¹ Code Civ. Pro., §§ 1894, 1895.

⁴ Code Civ. Pro., § 3170.

² Code Civ. Pro., § 1897.

⁵ Code Civ. Pro., § 3205.

³ Code Civ. Pro., §§ 1962, 1964.

preme Court, an order for the service thereof, as prescribed in the next section, upon a defendant residing within the State, may be made by the court, or a judge thereof, or the county judge of the county where the action is triable, upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained; or, if he is within the State, that he avoids service, so that personal service cannot be made."

"The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if, upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, or such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him at his place of residence, in the post-office at the place where he resides."

"The order and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted, otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the summons is deemed served."¹

Where a constructive service is relied upon, there must be a strict compliance with some of the modes prescribed by the Statute for obtaining such service.²

An order for substituted service can be made in a case where, defendant being sick and confined to bed at his residence, the persons in charge of him refuse to admit the officer to make service.³

¹ Code Civ. Pro., §§ 435-437; *Settlemer v. Sullivan*, 97 U. S. (7 Otto), 444; *Hughes v. Osborn*, 42 Ind., 450; *Hyslop v. Hoppock*, 5 Ben. (U. S.), 533; *Claypole v. Houston*, 12 Kan., 324; *Mullins v. Sparks*, 43 Miss., 129.

² *Bardsley v. Hines*, 33 Iowa, 157; *Merrill v. Montgomery*, 25 Mich., 73; *Scorpion S. M. Co. v. Marsauv*, 10 Nev., 370; *Brownfield v. Dyer*, 7 Bush. (Ky.), 505; *Campbell v. Evans*, 54 Barb., 566.

³ *Carter v. Youngs*, 42 N. Y. Supr. Ct., 169; *McCarthy v. McCarthy*, 16 Hun, 516.

An affidavit of the sheriff of the county where a defendant resided, that he had made diligent and proper efforts to serve the summons upon defendant by going to his residence and place of business, but that he could not be found in this State, is sufficient to warrant an order for substituted service.¹

4. *As to Service of Subpœna.*

How Served.—A subpœna, issued out of the court, to compel the attendance of a witness, and, where the subpœna so requires, to compel him to bring with him a book or paper, must be served as follows :

1. The original subpœna must be exhibited to the witness.
2. A copy of the subpœna, or a ticket containing its substance, must be delivered to him.
3. The fees, allowed by law, for traveling to, and returning from, the place where he is required to attend, and for one day's attendance, must be paid or tendered to him. ²

A witness in an action or a special proceeding, attending before a court of record, or a judge thereof, is entitled, except where another fee is especially prescribed by law, to fifty cents for each day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance.³

A witness attending before a commissioner or an officer, authorized to take his deposition, to be used without the State, in a case other than one specified in section 3327 of the Code of Civil Procedure, is entitled to two dollars a day for each day's actual attendance, and to eight cents for each mile, going to the place of attendance.⁴

A witness is entitled to twenty-five cents for each day's actual attendance, before a justice of the peace, in an action or a special proceeding, or before a commissioner appointed by a justice of the peace, or before a justice of the peace taking a deposition to be used in a court, not of record, of another State, or a territory of the United States.⁵

¹ *Simpson v. Burch*, 6 T. & C. (N. Y.), 560; S. C., 4 Hun, 315.

² Code Civ. Pro., § 852.

³ Code Civ. Pro., § 3318.

⁴ Code Civ. Pro., § 3319.

⁵ Code Civ. Pro., § 3327.

A subpoena, issued out of a court of record, except the marine court of New York city, may be served in any place within the State, and at any time of the day or night, except that it cannot be served upon Sunday.¹ The officer or person having it to serve, to perform his duty, may not enter a dwelling against the known wishes of the occupant, and doors cannot be broken open to make the service.² A license to enter the house of the party to be served, is always implied, if the officer find the door open. Once in, he is not a trespasser though the wife of the occupant order him out, and he may use force necessary to overcome the wife's resistance, to the service of the subpoena upon her husband.³ A subpoena of the marine court of New York city, can only be served within either of the counties of Richmond, Kings, Queens or Westchester.⁴

A person so subpoenaed, who fails, without reasonable excuse, to obey the subpoena, or a person who fails, without reasonable excuse, to obey an order duly served upon him, made by the court or a judge in an action, before or after final judgment therein, requiring him to attend and be examined, or so to attend and bring with him a book or a paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action, or in separate actions. If he is a party to the action in which he was subpoenaed, the court may, as an additional punishment, strike out his pleading.⁵

Where a judge or an arbitrator, referee or other person, or a board or committee, has been heretofore, or is hereafter expressly authorized by law, to hear, try or determine a matter; or to do any other act in an official capacity, in relation to which proofs may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge,

¹ Penal Code, § 268; Code Civ. Pro., §§ 278, 3201.

² *Hager v. Danforth*, 20 Barb., 16; S. C., 8 How. Pr., 435; *Mason v. Libbey*, 51 How. Pr., 436; S. C., 1 Abb. N. C., 354.

³ *Hager v. Danforth*, *supra*.

⁴ Code Civ. Pro., § 338, subd. 2.

⁵ Code Civ. Pro., § 853.

or officer, or a person designated in a commission issued by a court of another State or country, to give testimony or to have his deposition taken, or to be examined; a subpoena may be issued, by and under the hand of the judge, arbitrator, referee or other person, or the chairman, or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served as prescribed in section 852 Code Civil Procedure. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.¹

A person who is duly subpoenaed, as prescribed in section 854, of the Code of Civil Procedure, must obey the subpoena. If he fails so to do without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered as prescribed in section 853 of the Code of Civil Procedure. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record, or not of record; or if not then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county, commanding him to apprehend the defaulting witness, and bring him before the officer, person or body, before whom or which his attendance was required. This warrant can be executed in any part of the State.²

If the person subpoenaed, and attending, or brought as prescribed in section 855 of the Code of Civil Procedure, before an officer or other person, or a body, refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper, which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may, upon proof by affidavit of the facts by warrant, commit the offender to

¹ Code Civ. Pro., § 854.

² Code Civ. Pro., § 855, as amended by chap. 542, Laws of 1879, § 3201.

jail, there to remain until he submits to do the act which he was so required to do, or is discharged according to law.¹

A warrant of commitment, issued as thus prescribed, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.²

A warrant to apprehend or commit a person, issued as thus prescribed, must be directed to the sheriff of the county where the person is, and must be executed, by him, in the same manner, as a similar mandate issued, by a court of record, in an action.³

The foregoing provisions do not apply to a subpoena issued by a justice of the peace; or to a witness subpoenaed to attend a court held by a justice of the peace; or to a case where special provision is otherwise made by law, for compelling the attendance of a witness.⁴

A person duly and in good faith subpoenaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.⁵

The court, from which a subpoena, served in good faith, was issued, or by which an order was made, requiring a person to attend, for the purpose of being examined; or a judge thereof, upon proof, by affidavit, of the facts, must make an order, directing the discharge of a witness or other person, from an arrest made in violation of the last section.⁶

A justice of the Supreme Court, in any part of the State, or a county judge, or a judge of a superior city court, within his district, has the like authority as a judge of the court, to make an order for a discharge, in a case specified in section 861 of the Code of Civil Procedure. Upon satisfactory proof, by affidavit, of the facts, he must also make an

¹ Code Civ. Pro., § 856, as amended by chap. 542, Laws of 1879.

² Code Civ. Pro., § 857.

³ Code Civ. Pro., § 858.

⁴ Code Civ. Pro., § 859.

⁵ Code Civ. Pro., § 860.

⁶ Code Civ. Pro., § 861.

order, directing the discharge of a person arrested, in violation of section 860 of the Code of Civil Procedure, where a subpoena, served in good faith upon the person arrested, was issued as prescribed in section 854 of the Code of Civil Procedure.¹

An arrest, made contrary to the foregoing provisions of this title, is absolutely void, and is a contempt of the court, if any, from which the subpoena was issued, or by which the witness was directed to attend. An action may be maintained, by the person arrested, against the officer or other person making such an arrest, in which the plaintiff is entitled to recover treble damages. A similar action may also be maintained, in a like case, by the party in whose behalf the witness was subpoenaed, or the order procured, to recover the damages sustained by him, in consequence of the arrest.²

But a sheriff or other officer, or person, is not so liable, unless the person claiming an exemption from arrest makes, if required, an affidavit, to the effect that he was legally subpoenaed or ordered to attend, and that he was not so subpoenaed or ordered by his own procurement, with the intent of avoiding arrest. In his affidavit he must specify the court or officer, the place of attendance, and the cause in which he was so subpoenaed or ordered. The affidavit may be taken before the officer arresting him, and exonerates the officer from liability for not making the arrest.³

The foregoing provisions, relating to a person required by an order of a court to attend, apply where such an attendance is required by the terms of a judgment.⁴

A resident of another State cannot be served with process in an action against him, while attending in this State as a witness, before one of the courts therein. It can make no difference that the claim against him is barred, in the State where he lives, by the statute of limitations.⁵

A person shall not be compelled to produce upon a trial, or hearing, a book of account, otherwise than by an order

¹ Code Civ. Pro., § 862.

² Code Civ. Pro., § 863.

³ Code Civ. Pro., § 864.

⁴ Code Civ. Pro., § 865.

⁵ *Grafton v. Weeks*, 7 Daly, 523; *Person v. Grier*, 66 N. Y. (21 Sick.), 124.

requiring him to produce it, or a subpoena, *duces tecum*. Such a subpoena must be served at least five days before the day when he is required to attend.¹ Under the laws of this State, a witness, subpoenaed under a *duces tecum*, is entitled only to a fifty cents fee like other witnesses.²

5. *As to Service of Injunction and Other Orders.*

Where an injunction order is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order upon a corporation, may be made as the personal service of a summons upon a corporation is directed to be made (see *ante*). Copies of the papers upon which the order was granted, must be delivered with a copy of the order.³ And the better practice in the service of all orders in a civil action, is, to follow the rules prescribed for the service of injunction orders.

6. *Return and Proof of Service.*

Notwithstanding the election or appointment of a new sheriff, the former sheriff must return, in his own name, each mandate which he has fully executed.⁴ In such case he makes the return and signs it as the late sheriff. A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision he is liable to the party aggrieved, for the damages sustained by him, in addition to any fine, or other punishment or proceeding, authorized by law. A mandate directed and delivered to a sheriff may be returned by depositing the same in the post-office, properly inclosed in a post paid wrapper, addressed to the clerk at the place where his office is situated; unless the officer making the return resides in the place where the clerk's office is situated.⁵ If the process is returned by mail, the

¹ Code Civ. Pro., § 867, as amended by chap. 542, Laws of 1879.

² Re Corwin, 6 Abb. (N. C.), 437; Code Civ. Pro., § 3318.

³ Code Civ. Pro., § 610.

⁴ Code Civ. Pro., § 186.

⁵ Code Civ. Pro., § 102.

sheriff or other officer returning it must pay the postage thereon.¹

The return should be in the form of a certificate, signed by the officer making it, and attached to or indorsed upon the process returned, unless the statute requires the return to be on oath.²

The sheriff may personally make the return, whether the service was made by himself or by one of his deputies. If a deputy make the service, it is better that he should make the return thereof; and he must make it in the name of the sheriff, as "John Doe, sheriff, by Richard Roe, his deputy (or under sheriff)." In law, the sheriff must make the return; and a return by the deputy sheriff, in his own name, as deputy, is not a return by the sheriff.³ But that a process was returned to a wrong office, is not a ground for setting aside the proceedings.⁴ If the deputy who made the service is dead, or has gone out of office from any other reason, the sheriff must make the return, if he can do so, of facts of his own knowledge. If he cannot, in case of the deputy's death he may make the certificate in accordance with affidavits, showing statements made by the deputy during his sickness, to the affiants, as to the time and place of service;⁵ or, if the statements were made by the deputy directly to the sheriff, the latter's affidavit of such statements may be sufficient proof of the service.

A sheriff's return upon a writ should be sufficiently full to inform the court what his proceedings under the writ were, and how they were conducted, in order that the court may judge of their sufficiency under the statute. Therefore a return which merely states in general terms "exe-

¹ *Jenkins v. McGill*, 4 How. Pr., 205.

² Code Civ. Pro., 434.

³ *Bolard v. Mason*, 66 Penn. St., 138; *Simonds v. Catlin*, Col. & Caines, 346; S. C., 2 Caines, 61; *Ryan v. Eards*, Breese (Ill.), 163; *Rowley v. Howard*, 23 Cal., 401; *State v. Johnson*, 1 Hay (N. C.), 293; *Miller v. Alexander*, 13 Tex., 497; *Eastman v. Curtis*, 4 Vt., 616; *Calendar v. Olcott*, 1 Mich., 344. In Illinois it has been held that where the summons is served by a special deputy, by appointment, indorsed thereon, the statute does not require the return, which is to be made under oath, to be in the name of the sheriff. *Village of Glencoe v. People*, 78 Ill., 382.

⁴ *Ontario Bank v. Garlock*, 1 Wend., 288.

⁵ *Barber v. Goodell*, 56 How. Pr., 364.

cuted by personal service," or "executed in person" or the like is, wholly insufficient.¹ So a sheriff's return which merely states that the process was served on the firm of "M. & Bro.," is defective, in not showing who composed that firm.² But a sheriff's return that he served the summons upon "James Mayberry," and delivered to the said "James May" a certified copy of the complaint, has been held to be sufficient.³ So where the return of service, indorsed upon a declaration, recited that the sheriff "served the declaration, of which the within is a true copy," by delivering "a true copy thereof, and of the foregoing complaint, and the notice relating thereto," it was held that the use of the word "complaint" was an immaterial error, and did not affect the showing of due service. So, too, of the word "defendant" instead of "defendants," where it can be seen the latter was clearly intended.⁴ Where a sheriff's return recites the service of the writ upon "the within named" persons, naming three defendants, and charges fees for service of three copies, it sufficiently appears that each of the defendants was served with a copy of the writ.⁵ And where a sheriff made two certificates of service of a copy of summons and certified copy of complaint, according to one of which he served "a true of this writ attached to a certified copy of complaint," and, according to the other, he served "a true of the complaint attached to a true copy of the summons," it was held that the certificate of service was good, and that the omission in one certificate was cured by the statement in the other.⁶

A return to a summons, by the sheriff, that he has served the defendant personally therewith, is sufficient, without stating that the service was made in his county. This will be presumed.⁷ But in an action on a judgment rendered in

¹ Rankin v. Dulaney, 43 Miss., 197; Moore v. Coats, id., 225; Botsford v. O'Connor, 57 Ill., 72; Narou v. Guin, id., 346; and see Williams v. Downes, 30 Tex., 51; Hakes v. Shupe, 27 Iowa, 465; Johnson v. Murphy, 42 Vt., 645; Charles v. Marney, 1 Mo., 537; Wilson v. Greathouse, 1 Scam. (Ill.), 175.

² Mitchell v. Greenwald, 43 Miss., 167.

³ Allen v. Mayberry, 14 Nev., 115; and see Johnson v. Jones, 2 Neb., 126.

⁴ Hammond v. Baker, 39 Mich., 472.

⁵ Martin v. Hargardine, 46 Ill., 322.

⁶ Norton v. Meader, 4 Sawyer (U. S.), 603.

⁷ Knowles v. Gas-light and Coke Co., 19 Wall. (U. S.), 59; Gilbert v. Brown, 9 Neb., 90.

another State, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served.¹

Proof of Service.—Proof of service of a summons must be made by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof.

2. If the defendant served is an adult, who has not been judicially declared to be incompetent to manage his affairs, the service may be proved by a written admission, signed by him, and either acknowledged by him, and certified in like manner as a deed to be recorded in the county, or accompanied with the affidavit of a person, other than the plaintiff, showing that the signature is genuine.

A certificate, admission, or affidavit of service of a summons, must state the time and place of service. A written admission of the service of a summons, or of a paper accompanying the same, imports, unless otherwise expressly stated therein, or otherwise plainly to be inferred from its contents, that a copy of the paper was delivered to the person signing the admission.²

As is seen the statute is imperative. The proof must state the time and place of service. In Georgia, however, it has been lately held that where the return of service by an officer is not dated, the presumption is that service was perfected within the time prescribed by law.³ Under the New York statute no such presumption would arise. Proof of service without the date would be no proof. Undoubtedly a return of service in the following form would sufficiently show the date of service: "January 18, 1881. I have served the written summons upon the defendant, John Doe, by delivering to and leaving with said defendant a copy thereof."⁴ It has been held in Iowa that failure to incorporate in the return

¹ Knowles v. Gas-light and Coke Co., 19 Wall. (U.S.), 59; Webster v. Hunter, 50 Iowa, 215.

² Code Civ. Pro., § 434.

³ Reid v. Jordan, 56 Ga., 282.

⁴ See Marlow v. Kuhlenbeck, 2 Col. T., 602; and see to the contrary, Philadelphia v. Cathcart, 10 Phil. (Penn.), 103.

the date of service of the summons, will not render the judgment liable to collateral attack.¹

Although the statute requires that an admission of service shall state the time of service; yet, if such time is stated as of a date prior to the day of actual service, and judgment is entered within twenty days from the time of actual service, but after twenty days from the date in the admission, this will not render the judgment fraudulent as against the creditor of the defendant.²

A return by the sheriff, that he served the defendant with a copy of the summons, will be held equivalent to saying that he served the summons by delivering a copy thereof to the defendant, and will be a substantial compliance with the statute.³ But under the statute requiring the delivery of a copy, a return of the service, "by reading it to the defendant," is clearly insufficient.⁴

A return of service upon a corporation, should state the name of the man to whom the copy was delivered, and should state he was the president, secretary or clerk to the corporation, as the fact may be. If the service is stated to be on "J. as secretary," it is invalid. It should state that he was secretary to the corporation.⁵

The statute requiring the return of service of a summons, when made by a special deputy, to be verified by oath, is complied with, if the return is verified by the affidavit of the person making the service. The matter may be reduced to the form of an affidavit, signed and sworn to by the person or officer making it.⁶ The directions in the process as to the person to whom, and the place where the return should be made, whether service is made by sheriff, deputy or special deputy, should be strictly followed. Ordinarily the process is returnable in civil actions to the court, attorney or other

¹ *Wilson v. Call*, 49 Iowa, 463.

² *Peck v. Richardson*, 9 Hun, 567; but see *Trolan v. Fagan*, 48 How. Pr., 240; *Brown v. Marrigold*, id., 248.

³ *Central Bank v. Wright*, 12 Wend., 190; *Hedges v. Mace*, 72 Ill., 472; *Turner v. Jenkins*, 79 Ill., 228; but see *York v. Crawford*, 42 Miss., 508; *Davis v. Patty*, id., 509.

⁴ *Noleman v. Weil*, 72 Ill., 502; *Cairo, etc. R. R. Co. v. Joiner*, id., 520; *Newlove v. Woodward*, 9 Neb., 502.

⁵ *Chicago Plaining Mill Co. v. Merchant's Bank*, 86 Ill., 587; *Merriden v. Trussell*, 52 Miss., 711; *Cairo and St. Louis R. R. Co. v. Holbrook*, 92 Ill., 297.

⁶ *Edwards v. McKay*, 73 Ill., 570.

officer issuing it. A summons, subpoena, citation and an order, should be returned always to the attorney issuing it, unless specific directions to the contrary are given. Jury process should be returned to the court or officer before whom such jury is to appear. Executions in courts of record must be returned to the office of the clerk of the court out of which they are issued.

When substituted service, by order of the court, is directed to be made, a return proper and regular in other respects, except that it stated service to be "by copy left at the residence," was held sufficient.¹ So it has been held that a return of such process, as served, by leaving the summons with a member of defendant's family over sixteen years of age, is not fatally defective although it does not give the name of such person.²

Until process with the return thereon is actually filed in the proper office, the return is under the control of the officer making it, and may be amended by him so as to state the facts.³ After the filing, the process and the return are in the custody and control of the court, and thereafter he may amend it by leave of the court, on proper terms and on due notice, even after the commencement of an action against him for an insufficient and a false return.⁴ And the return, thus amended, will relate back and take the place of the original.⁵ So where a writ was filed without any indorsement, the court has allowed a return to be made *nunc pro tunc*, on payment of costs.⁶ A notice of an application to the court for leave to amend a return, need not be given unless some one has acquired rights on the faith of the return.

¹ Pigg v. Pigg, 43 Ind., 117.

² Robinson v. Miller, 57 Miss., 237.

³ Spoor v. Holland, 8 Wend., 445; Nelson v. Cook, 19 Ill., 440.

⁴ People v. Ames, 35 N. Y. (8 Tiff.), 482; Higgins v. Bullock, 66 Ill., 37; Primrose v. Browning, 59 Ga., 69; Golden Paper Co. v. Clark, 3 Col., 321; National Ins. Co. v. Chamber of Commerce, 69 Ill., 22; Kirkwood v. Reedy, 10 Kan., 453; Toledo, etc., R. R. Co. v. Butler, 53 Ill., 323; McCure v. Wells, 46 Mo., 311; Corby, etc., v. Burns, 36 Mo., 194; Northrup v. Shephard, 2 Wis., 513; Nelson v. Cook, 19 Ill., 440, 455; Barker v. Binninger, 14 N. Y. (4 Kern.), 270.

⁵ People v. Ames, 35 N. Y. (8 Tiff.), 482; Capehart v. Cunningham, 12 W. Va., 750; Armstrong v. Garrow, 6 Cow., 465.

⁶ Hale v. Ayer, 19 How., 91; Nelson v. Brown, 23 Mo., 13.

And the court possesses, and may exercise, the power to reinvigorate an execution upon application of the sheriff, without notice, to the defendant therein, by erasing the return of *nulla bona*.¹ But no amendment of the officer's return should be permitted, when such amendment would destroy or lessen the rights of third persons acquired *bona fide*, and without notice by the record or otherwise. Yet, if the return contain sufficient to indicate that all the requirements of the statute have been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor.² So where a sheriff, under an execution, had sold three parcels of land belonging to the defendant in the execution, but in the certificate of sale which he had made and filed, by mistake, had omitted to mention one of these parcels, the court, on motion of the purchaser, ordered the sheriff to amend his certificate, by inserting therein that he had also sold the parcel omitted.³

The report, or certificate of an officer, is evidence only of facts which, by law, he is required or authorized to certify.⁴ And the return of a sheriff as to those *acts* and doings, which have respect to his official duties arising under the mandatory part of his process is *prima facie* evidence in his own favor; but it is no evidence at all of facts excusing the non-performance of those duties.⁵ And this is so even in an action between third parties, and where the facts stated in the return come collaterally in question.⁶ It is so, because it is the official act of a man acting under oath.⁷ There are cases in which such a return is held to be not only

¹ *Barker v. Binninger*, 14 N. Y. (4 Kern.), 270.

² *Glidden v. Philbrick*, 56 Me., 222.

³ *Smith v. Hudson*, 1 Cow., 430.

⁴ *Water Comm's v. Lansing*, 45 N. Y. (6 Hand), 19.

⁵ *Browning v. Hanford*, 5 Denio, 586; *Cornell v. Cook*, 7 Cow., 310; *Spoor v. Holland*, 8 Wend., 445; *Earl v. Camp*, 16 Wend., 562; *Splahn v. Gillespie*, 48 Ind., 397; aff'g, 1 Wils., 228; *Joyner v. Miller*, 55 Miss., 208; *Owens v. Ranstead*, 22 Ill., 161.

⁶ *Russell v. Gray*, 11 Barb., 541; 1 Phil. Ev., 391; *Baker v. McDuffie*, 23 Wend., 239; *Bullis v. Montgomery*, 50 N. Y., 352; rev'g in part S. C., 3 Lans., 255; *Case v. Redfield*, 7 Wend., 398; N., etc., R. R. Co. v. Purdy, 18 Barb., 574; *Hubbard v. Chapin*, 28 How. Pr., 407.

⁷ *Hyskell v. Given*, 7 Serg. & R. (Penn.), 371; *Dutton v. Tracy*, 4 Conn., 79.

prima facie but conclusive evidence against those who were neither parties nor privies to the process upon which it was made; but generally such persons, when affected by it, are at liberty to contradict or vary its effect by other proof.¹

As against the officer, and those claiming in privity with him, his return is conclusive as to his acts stated in it, within the scope of his duty, as evidence in favor of parties who claim an interest or a right under the return; and when thus conclusive, not even the officer or his deputy can testify in contradiction to it.² And although the return be made by a deputy in the sheriff's name, it is the act of the sheriff,³ and when the question comes up directly between one of the parties to the process, and the sheriff, the latter is not permitted to gainsay it.⁴ The return of a sheriff is *prima facie* evidence in favor of the officer making it, notwithstanding it was made after the commencement of the action.⁵ A sheriff's return to process is but a statement of what has been done in obedience to its command. Every act done by him in the course of the execution of the writ, every step taken, may be indorsed as they occur. Upon an execution, for example, first the levy, next the advertisement, and then the sale—each in its order is an official act, and each may thus be indorsed as they are successively performed. In the aggregate these statements will furnish a complete response by the officer, and a full return to the writ. In practice it is certainly true, that sheriffs are not particular to note each step taken in the course of executing the writ. A general return at the close is usually made, and that is all which may be material between the parties to the process, and ordinarily all which is material to anyone. Still it would

¹ Russell v. Gray, 11 Barb., 541; and see Johnson v. Jones, 2 Neb., 126; Mueller v. Bates, 2 Disney (Ohio), 318.

² Sheldon v. Payne, 7 N. Y. (3 Seld.), 453; Baker v. McDuffie, 23 Wend., 289; Watson, 72; 1 Lord Raym, 184; Rowell v. Klein, 44 Ind., 290; Davant v. Carlton, 57 Ga., 489; State v. O'Neil, 4 Mo. App., 221; Elder v. Cozart, 59 Ga., 199; Fitzgerald v. Kimball, 86 Ill., 396.

³ Sheldon v. Payne, *supra*; Townsend v. Olin, 5 Wend., 207; Gardner v. Hosmer, 6 Mass., 327; Haynes v. Small, 22 Me., 14; Purrington v. Loring, 7 Mass., 392; Doty v. Turner, 8 Johns., 20; Barrett v. Copeland, 18 Vt., 69; Paxton v. Steckel, 2 Barr., 93.

⁴ Bechstein v. Sammis, 10 Hun, 585; Henderson v. Cairns, 14 Barb., 15; Glover v. Whittenhall, 2 Denio, 633; Birkbeck v. Stafford, 14 Abb. Pr., 235.

be strictly within the limits of the official duty of the sheriff, to note each step as taken in the execution of process in his hands; and as each is an official act, done in obedience to a lawful command, the law makes his official statement of what he so does, evidence in his favor. The evidence is not conclusive in his favor, but no rule is better settled than that it is admissible.¹ *And the rule is not limited to such returns as have been filed, and thus become matters of record.* The statement is evidence because it is a return, so far, of what the officer has done under the command of the writ, and not because it is such a statement placed on the files of the court.²

The plaintiff suing on a return may contradict it, by denying that acts returned as having been done, were done by his special direction.³ And it has been held that even the sheriff when sued, and when the return is used against him as evidence, is not stopped from showing that property returned, as taken as the goods of A. was not in fact A.'s property, or that plaintiff was not entitled to the proceeds.⁴ When the return is used as evidence against the officer making it, the whole return, so far as the same is a legal and proper return, must be taken together.⁵ A sheriff's indorsement of the time of receiving an execution, is conclusive evidence against him that it was then in his hands.⁶ But his indorsement of the time of receiving a summons, is not evidence of the time of the commencement of the action.⁷ His certificate of the sale of real estate, is presumptive evidence of the facts therein necessarily contained. But not of a fact unnecessarily recited therein, as of the existence of the exe-

¹ *Glover v. Whittenhall*, 2 Denio, 633, 635, referring to Cowen and Hill's notes to Phil. Ev., 157, 1083-1085, 1092, 1093, and authorities there cited, and see *Dasher v. Dasher*, 47 Ga., 320; *Bond v. Wilson*, 8 Kan., 229; *Whitehead v. Keyes*, 3 Allen, 495; S. C., 1 Am. L. Reg. (N. S.), 471, and note by Redfield.

² *Glover v. Whittenhall*, 2 Denio, 633, 636.

³ *Townsend v. Olin*, 5 Wend., 208.

⁴ *Hopkins v. Chandler*, 17 N. J. L. (2 Harr.), 299; and see *Fuller v. Holden*, 4 Mass., 498; *Leonard v. Bryant*, 13 Mass., 224; *Whiting v. Bradley*, 2 N. H., 83.

⁵ Cowen and Hill's Notes to Phil. Ev., 228.

⁶ *Williams v. Lowndes*, 1 Hall, 579.

⁷ *Wardell v. Patrick*, 1 Bosw., 406.

cution.¹ So a return to an execution, that goods levied on had been casually destroyed by fire after the levy, will not be competent evidence for the sheriff, in an action against him for not collecting such execution.²

When the return of "summoned" by a sheriff is disputed, the burden of proof is upon the party assailing such return, and it is incumbent upon him to show by evidence of the most satisfactory character that he was not summoned.³ But the official certificate of a sheriff of another State, is not evidence of service; his affidavit must be procured.⁴

An officer's return in a proceeding in chancery may be impeached;⁵ and a sheriff's return, with respect to service of original process, may be impeached so far as it states facts upon which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff, but must be ascertained by him from inquiry.⁶ So the date of his return of an execution for possession, under a writ of entry, is not conclusive as to the actual date of possession.⁷

SECTION II.

ARREST PENDING THE ACTION, AND PROCEEDINGS THERE UPON.

When Allowed.—A person shall not be arrested in a civil action or special proceeding, except as prescribed by statute. The writ of *ne exeat* is abolished.⁸

¹ *Anderson v. James*, 4 Rob., 35; aff'd by the Court of Appeals, 6 Alb. L. J., 166.

² *Browning v. Hanford*, 5 Denio, 586.

³ *Abell v. Simon*, 49 Md., 318; and see *Hunter v. Stoneburner*, 92 Ill., 75; *Zimmerman v. Merchants' Nat'l Bank*, 1 Mich. (N. P.), 14.

⁴ *Thurston v. King*, 1 Abb. Pr., 126; *Morrell v. Kimball*, 4 id., 352; and see *Webster v. Hunter*, 50 Iowa, 215.

⁵ *Leftwick v. Hamilton*, 9 Heisk. (Tenn.), 310.

⁶ *Chambers v. King Wrought-Iron Bridge Manuf.*, 16 Kan., 270.

⁷ *Worthy v. Warner*, 119 Mass., 550; and see *Stewart v. Camden, etc., R. R. Co.*, 33 N. J. L. (4 Vr.), 115.

⁸ Code Civ. Pro., § 548.

A defendant may be arrested in an action, where the action is brought for either of the following causes :

1. To recover a fine or penalty.

2. To recover damages for a personal injury ; an injury to property including the wrongful taking, detention or conversion of personal property ; breach of a promise to marry ; misconduct or neglect in office, or in a professional employment ; fraud ; or deceit. But this subdivision does not apply to a claim for damages in an action to recover a chattel.

3. To recover money, funds, credits or property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency or agent of the State, or of a city, county, town, village or other division, subdivision, department or portion of the State, which the defendant has, without right, obtained, received, converted or disposed of ; or to recover damages for so obtaining, receiving, paying, converting or disposing of the same.

4. In an action upon contract express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability. Where such an allegation is made the plaintiff cannot recover, unless she proves the fraud, and a judgment for the defendant is not a bar to a new action to recover upon the contract only. ¹

A defendant may also be arrested in either of the following cases :

1. In an action to recover a chattel, where the chattel, or a part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof.

2. In an action upon contract, express or implied, other than a promise to marry, where the defendant has, since the making of the contract, or in contemplation of making the same, removed or disposed of his property, with intent to defraud his creditors, or is about to remove or dispose of the same, with like intent.

¹ Code Civ. Pro., § 549, as amended by Laws of 1879, chap. 542, § 1, p. 605.

3. In an action to recover for money received, or to recover property, or damages for the conversion or misapplication of property; where the money was received, or the property was embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. But this subdivision does not apply to an action to recover a chattel.

4. In an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt; where the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure, there is danger, that a judgment or an order, requiring the performance of the act, will be rendered ineffectual.¹

The recovery of judgment in a court, not of the State, for the same cause of action; or, where the action is founded upon fraud or deceit, for the price or value of the property obtained thereby, does not affect the right of the plaintiff to arrest the defendant.²

Where the action is brought in this State upon a foreign judgment, an order of arrest may be granted if such order would have been proper, in an action upon the original cause of action.³

Where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, his right to an arrest is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment. And for the purpose of applying to such a case the provisions of the Code, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counter-claim so set forth in the answer is deemed the complaint.⁴

When not Allowed.—An order of arrest cannot be granted in the case of the submission of a controversy, upon facts

¹ Code Civ. Pro., § 550; *Boucicault v. Boucicault*, 21 Hun, 431.

² Code Civ. Pro., § 552.

³ *Baxter v. Drake*, 85 N. Y., 502; *aff'g S. C.*, 22 Hun, 565.

⁴ Code Civ. Pro., § 720, as amended by the Laws of 1879, chap. 542, p. 606.

admitted as prescribed by section 1279 of the Code of Civil Procedure.¹ It may be granted in an action by the attorney general, in behalf of the people against one usurping, intruding into, unlawfully holding, or exercising an office, where the complaint sets forth the name of the person rightfully entitled to the office, and the facts showing his right thereto; and it appears by affidavit, that the defendant, by means of his usurpation or intrusion, has received fees or emoluments belonging to the office.²

2. *Privilege from Arrest.*

Non-Payment of Costs.—A person shall not be arrested or imprisoned for the non-payment of costs, awarded otherwise than by a final judgment, or a final order made in a special proceeding, instituted by State writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.³

Disobedience to Judgment or Order.—Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.⁴

Females, Lunatics, etc.—A woman cannot be arrested in a civil action or proceeding, except in a case where the order can be granted only by the court; or where it appears that the action is to recover damages for a willful injury to person, character or property.⁵

A lunatic, an idiot, or an infant under the age of fourteen years, if arrested, may be discharged from arrest as a privileged person, in the discretion of the court. The application for his discharge may be made in his behalf, by a relative, or by any other person whom the court or judge permits to represent him, for the purpose.⁶

¹ Code Civ. Pro., § 1281.

² Code Civ. Pro., § 1949.

³ Code Civ. Pro., § 15.

⁴ Code Civ. Pro., § 16.

⁵ Code Civ. Pro., § 553; see *Clark v. Grant*, 33 N. J. L., 257.

⁶ Code Civ. Pro., § 554.

A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next of kin, assignee, or trustee, cannot be arrested, except for his personal act.¹

Word "Willful" Defined.—The word "*willful*" as used in section 553 of the Code of Civil Procedure, was designed to define the nature of the injury, so that to arrest a female it should appear that the act which the law holds to be an injury to property, was a willful and an intentional one. The manifest intention is to exempt females in all cases from arrest, except when the injuries specified in the Code, are affirmatively shown to be willful. But to authorize the the arrest of a female for an injury to property, it is not necessary to be shown that she had done some physical injury to the thing itself. The property is the right, and not the thing—the right to have, use and enjoy the thing securely and unmolested—and whenever that right is disturbed, the law gives an action for the injury, irrespective of the condition of the thing in which the right or property exists.² So, if a woman borrow money, by falsely representing as genuine, certain forged bonds, delivered to the lender as security, she is liable to arrest as for a willful injury.³ But neither a married woman nor her husband can be arrested for an assault and battery by her.⁴ And a female cannot be arrested for costs.⁵

Attorneys and Other Officers of Court.—An officer of a court of record, appointed or elected pursuant to law, is privileged from arrest during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or a counsellor is not thus privileged, unless he is employed in a cause to be heard at that term.⁶ But an attorney or counsellor is not

¹ Code Civ. Pro., § 555.

² *Duncan v. Katen*, 6 Hun, 1, aff'd 64 N. Y., 625; *No. Ry. Co. v. Carpentier*, 3 Abb. Pr., 259; S. C., 13 How. Pr., 222; *Starr v. Kent*, 2 Code R., 30; *Solomon v. Waas*, 2 Hilt., 179,

³ *Eypert v. Bolenius*, 2 Abb. (N. C.), 193; and see *Duncan v. Katen*, *supra*.

⁴ *Anon.*, 8 How. Pr., 134.

⁵ *Neville v. Neville*, 22 How. Pr., 500; *Hovey v. Starr*, 42 Barb., 435; *Moncrief v. Ward*, 25 How. Pr., 94.

⁶ Code Civ. Pro., § 565; *Willard v. Sperry*, 1 Wend., 32.

privileged from arrest at his home, though it prevent his attendance at court.¹ Nor is he so privileged while attending before a master, or examiner out of court.² If he ceases to practice for a year he loses his privilege.³ An attorney, not the attorney of record, while attending a party to advise him, while such party was putting in bail, was held not to be exempt from arrest.⁴

Officer of Unincorporated Association.—The defendant, in an action against an officer, *as such*, of an unincorporated association, cannot be arrested.⁵

United States Senators and Representatives.—Senators and representatives in congress, in all cases, except treason, felony and breach of the peace, are privileged from arrest during attendance at the sessions of their respective houses, and in going to and returning from the same.⁶

Members of State Legislature.—Every member of the legislature shall be privileged from arrest, on civil process, during his attendance at the session of the house to which he shall belong, except on process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust, in any office or place of public trust held by him. He is entitled to a like exemption for fourteen days prior to the session, and also during an adjournment of the house, provided such adjournment do not exceed fourteen days, and also while returning to his residence from the sitting, provided the time in returning do not exceed fourteen days. He is also entitled to the privilege, while absent with leave of the house to which he shall belong.⁷ But he is not (nor is a member of congress)⁸ entitled to his privilege after he has reached home, upon a final adjournment, though within the fourteen days.⁹ No officer of either house, while in

¹ *Corey v. Russell*, 4 Wend., 204.

² *Cole v. McClellan*, 4 Hill, 59.

³ *Brooks v. Patterson*, Col. & Caines, 133; S. C., 2 Johns. Cas., 102.

⁴ *Jones v. Marshall*, 2 C. B. (N. S.), 615; S. C., 40 Eng. L. and Eq., 321.

⁵ Code Civ. Pro., § 1921.

⁶ U. S. Const., art. 1, § 6, subd. 1; *Hoppin v. Jenkes*, 8 R. I., 453.

⁷ 1 R. S., 504 (6th ed.), §§ 6-9; id. (5th ed.), 455, §§ 6-9.

⁸ *Lewis v. Elmdorf*, 2 Johns. Cas., 222.

⁹ *Colvin v. Morgan*, 1 Johns. Cas., 415; *Corey v. Russell*, 4 Wend. 204.

actual attendance upon the house, shall be liable to arrest on civil process.¹

Public Ministers of Foreign States, etc.—Whenever any writ or process, is sued out, or prosecuted by, any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant, of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void.² Every person by whom such writ or process is sued out or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined, at the discretion of the court.³ But the above laws do not apply where the person, against whom the process is issued, is a citizen or inhabitant of the United States,⁴ in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor do they apply to any case where the person proceeded against is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the department of State, and transmitted by the secretary of state to the marshall of the District of Columbia, who shall, upon receipt thereof, post the same in some public place in his office;⁵ and all persons shall have resort to the list of names so posted, and may take copies without fee.⁶ Ambassadors and public ministers, accredited to another country, are privileged from arrest while passing through this State in the discharge of their mission.⁷

Enlisted Men, Marines, etc.—No enlisted man shall, during his term of service, be arrested on mesne process, or

¹ 1 R. S. (5th ed.), 455, § 10; id. (6th ed.), 501, § 10; *Matter of Potter and French*, 55 Barb., 625.

² U. S. R. S., 789, § 4063.

³ U. S. R. S., 789, § 4064.

⁴ U. S. R. S., 789, § 4065.

⁵ U. S. R. S., 789, § 4066.

⁶ *Holbrook v. Henderson*, 4 Sandf., 619.

taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted.¹ Marines shall be exempt, while enlisted in the marine corps, from all personal arrest for debt or contract.² No person belonging to the military forces of the State, shall be arrested on any civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty.³ A commissioned officer of the State militia is protected under the last provision, although his regiment has been mustered into the service of the United States.⁴

Policemen.—No person holding office under the acts organizing the Metropolitan Police, or under the act organizing the Niagara Frontier police, is liable to arrest on civil process.⁵ Section sixty of the rules of the Metropolitan Police Commissioners, provide that certain officers shall be deemed always on duty, but the court has construed this to be a matter of discipline, and that it does not protect such officers from arrest when not *actually on duty*.⁶

Electors.—Whenever an election shall be held in any city or town under the general election law, and whenever any town meeting shall be held in any town, no civil process shall be served in any such city or town, on any elector entitled to vote therein, on any day during which such election or town meeting shall be held.⁷

Certain Canal Officers.—No acting commissioner, superintendent of repairs, collector or lock-keeper, on any canal, shall be held to bail, or taken by warrant in any civil suit, for any act done, or omitted to be done by him, in the exercise of his official duties.⁸

¹ U. S. R. S., 216, § 1237.

² U. S. R. S., 273, § 1610.

³ 1 R. S., (6th ed.), 814, § 257.

⁴ People ex rel. Gastón v. Campbell, 40 N. Y., 133.

⁵ Laws of 1864, chap. 403, § 34; 1865, chap. 554, § 27; 1866, chap. 484, § 30;
⁶ Edm. Stat. at Large, 274, 509, 757.

⁷ Hart v. Kennedy, 24 How. Pr., 425; S. C., 39 Barb., 186; 15 Abb. Pr., 290; rev'g S. C., 14 id., 432; S. C., 23 How. Pr., 417; Squire's Case, 12 Abb. Pr., 38; Coxson v. Doland, 2 Daly, 66.

⁸ 1 R. S. (5th ed.), p. 418, § 3; 819, 22; 1 id. (6th ed.), p. 427, § 4; 827, § 31; Meeks v. Noxon, 1 Abb. Pr., 280; Bierce v. Smith, 2 id., 411.

⁹ 1 R. S. (6th ed.), 653, § 62; 1 id. (5th ed.), 588, § 61.

Suitors.—A suitor, whilst attending court, is privileged from arrest, but not from the service of civil process.¹ This privilege is his while going to, remaining at and returning from court, and is accorded him by the common law. A reasonable time before the sitting of the court, at which he must attend as a suitor, the privilege commences; and it endures until a reasonable time after the cause is disposed of has elapsed.² A party attending a reference is entitled to privilege from arrest; but it extends only to a reasonable time after the hearing.³ A person under recognizance to appear at a court of general sessions of the peace, while attending that court is privileged from arrest, especially if it appear that he had had no opportunity to apply for a discharge.⁴ But a prisoner acquitted of a criminal charge is not, it has been held, privileged from arrest on civil process, during the sitting of court, and before he leaves the court room.⁵ And one convicted of an assault and battery, at a court of special sessions, was held not to be privileged while returning to his home, from arrest in a civil action for the same offense.⁶ But if criminal process be fraudulently issued, for the purpose of detaining the defendant, until he can be arrested in a civil action, he will be discharged with costs.⁷ It has also been held, that one brought into the State as a fugitive from justice, is not privileged from arrest on a *capias*.⁸ A suitor who goes to the court to ascertain whether anything will be done in the cause, is privileged from arrest on his return; and though he stop to announce to the counsel for the opposite party, that no steps would

¹ *Jenkins v. Smith*, 57 How. Pr., 171.

² *Harris v. Grantham, Coxe* (N. J.), 142; *Blight v. Fisher, Peters' C. C.*, 41; *Commonwealth v. Ronald*, 4 Call. (Va.), 97; *Hurst's Case*, 4 Dall., 387; *McNeil's Case*, 6 Mass., 245, 264; *Clark v. Grant*, 2 Wend., 257; *Taft v. Hoppin, Anth. N. P.*, 255; *Coburn v. Hopkins*, 1 Wend., 292; *Pollard v. Union Pacific R. R. Co.*, 7 Abb. Pr. (N. S.), 70.

³ *Clark v. Grant*, 2 Wend., 257.

⁴ *Bours v. Tuckerman*, 7 Johns., 538.

⁵ *Lynch's Case*, 1 C. H. Rec., 138; *Shotwell's Case*, 4 id., 75; *Moore v. Green*, 73 N. C., 394.

⁶ *Lucas v. Albee*, 1 Denio, 666; and see *Key v. Jelto*, 1 Pittsb. (Penn.), 117.

⁷ *Benninghoff v. Oswell*, 37 How. Pr., 235.

⁸ *Williams v. Bacon*, 10 Wend., 636.

be taken in the cause, he does not thereby forfeit his privilege.¹

Witnesses.—A person duly and in good faith subpoenaed or ordered or required by the terms of a judgment, to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.² An arrest made contrary to this provision of the Code is absolutely void, and is a contempt of the court, if any, from which the subpoena was issued, or by which the witness was directed to attend. An action may be maintained by the person arrested, against the officer or other person making such arrest, in which the plaintiff is entitled to recover treble damages. A similar action may also be maintained, in a like case, by the party in whose behalf the witness was subpoenaed, or the order procured, or the judgment directed, to recover the damages sustained by him, in consequence of the arrest.³ But a sheriff, or other officer or person, is not so liable, unless the person claiming an exemption from arrest, makes, if required, an affidavit, to the effect that he was legally subpoenaed or ordered to attend, and that he was not so subpoenaed or ordered by his own procurement, with the intent of avoiding arrest. In his affidavit he must specify the court or officer, the place of attendance, and the cause in which he was so subpoenaed or ordered. The affidavit may be taken before the officer arresting him, and exonerates the officer from liability for not making the arrest.⁴

A witness who attends, without *subpœna*, is not privileged from arrest, though he be examined and testify on the trial.⁵ A witness is entitled to a reasonable time for attendance on a *subpœna*, and need not travel on Sunday.⁶ But after the attendance he loses his privilege, unless he pro-

¹ Sallinger v. Adler, 2 Rob., 704.

² Code Civ. Pro., §§ 860, 865.

³ Code Civ. Pro., §§ 863, 865.

⁴ Code Civ. Pro., § 864.

⁵ Hardenbrook's Case, 8 Abb. Pr., 416; Cole v. McClellan, 4 Hill, 59.

⁶ Wilkie v. Chadwick, 13 Wend., 49.

ceeds to his house, within a reasonable period; that he has been arrested, and given bail in another action, is no excuse.¹ But a citizen from another State, while voluntarily and in good faith attending court as a witness, is privileged from arrest in a civil case.² So, too, if he attend before arbitrators.³

Sheriff not Bound to Notice Fact of Exemption.—It will be seen from the tenor of the foregoing statutes and adjudications, and, indeed, it has been expressly decided, that a sheriff is not *bound* to notice the fact that a person, except a witness, is exempted by law from arrest on civil process. But if he chooses to notice it, or neglects to take a person privileged from arrest, *and can show that he is so privileged*, it is a good defense in an action against him for an escape or other neglect of duty.* It is better, however, that the officer should do exactly as his process directs him, if it be fair on its face. If thereby he arrest a privileged person, his process protects him, unless the party claims to be a witness, and exempt on that account, and makes the affidavit the Code requires.⁵ If he fail to make the arrest, or if, the arrest being made, he permit the party to go free, the burden is upon him to prove the party's exemption from arrest.

3. *Order For, How, When and by Whom Granted.*

In a case specified in subdivision fourth of section 550 of the Code of Civil Procedure, the order of arrest can be granted only by the court; is always in its discretion, and may be granted or served, either before or after final judgment, unless an appeal from the judgment is pending, upon which security has been given, sufficient to stay the execution thereof. In either of the other cases specified in said section, and in section 549, the order cannot be served after final judgment; but it may be granted, where a proper case there-

¹ *Shults v. Andrews*, 54 How. Pr., 380.

² *Dixon v. Ely*, 4 Edw. Ch., 557; *Norris v. Beach*, 2 Johns., 294; *Ballinger v. Elliott*, 72 N. C., 596; *May v. Shumway*, 82 Mass. (16 Gray), 86.

³ *Sanford v. Chase*, 3 Cow., 381.

⁴ *People v. Campbell*, 40 N. Y., 133; *Ray v. Hogeboom*, 11 Johns., 432; *Sperry v. Willard*, 1 Wend., 32; *Varrill v. Heald*, 11 Me., 91; *Secor v. Bell*, 18 Johns., 152.

⁵ *Chase v. Fish*, 4 Shep. (Ala.), 132.!

for is presented, at any time before final judgment.¹ In all other cases, the order of arrest must be obtained from a judge of the court in which the action is brought, or from any county judge.² The order may be granted in a case specified in section 549 of the Code of Civil Procedure, where it appears, by the affidavit of the plaintiff, or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section. It may be granted in a case specified in section 500, upon the like proof that a sufficient cause of action exists against the defendant, as prescribed in that section, and of the other matters extrinsic to the cause of action, specified in that section. The affidavit may also contain any statement, tending to determine the amount of bail to be required.³ Subject to the foregoing provisions, the order may be granted at any time, after the commencement of the action. It may also be granted to accompany the summons. But at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint fails to set forth a sufficient cause of action, as required by section 557 of the Code of Civil Procedure.⁴ Except where the action is brought for a cause specified in subdivision third of section 549 of the said Code, or in a case where it is specially prescribed by law, that security may be dispensed with, or the security to be given is specially regulated by law, the judge, before he grants the order, must require a written undertaking, on the part of the plaintiff, with two sufficient sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least equal to one-tenth of the amount of bail required by the order, and not less than \$250.⁵

Where the order can be granted only by the court, an un-

¹ Code Civ. Pro., § 551.

² Code Civ. Pro., § 526; *Kennedy v. Simmons*, 1 How. Pr., 603.

³ Code Civ. Pro., § 557, as amended in 1879.

⁴ Code Civ. Pro., § 558.

⁵ Code Civ. Pro., § 559.

dertaking on the part of the plaintiff may be dispensed with. If it is required, its form, and the security to be given thereupon, must be such as the court prescribes.¹ Under section 770 of the Code of Civil Procedure, providing that in the the first judicial district, "a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits," an order of arrest may, in that district, be granted in one of the classes of actions described in subdivision 4, of section 550 of said Code, by a judge out of court.²

Order, Contents of.—The order must be subscribed by the plaintiff's attorney, and, except where it is granted by the court, by the judge. It may be directed either to the sheriff of a particular county, or generally to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum, and to return the order, with his proceedings thereunder, as prescribed by law. The plaintiff's attorney may, at his option, by an indorsement upon the order, or, where it was granted by the court, upon the copy thereof, delivered to the sheriff, fix a time within which the defendant must be arrested. In that case he cannot be arrested afterwards, under the same order.³

When Security not Required.—Each provision of the Code of Civil Procedure, requiring a party to give security for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding, or allowing the court or a judge to require such security to be given, is to be construed as excluding an action brought by the people of the State, or by a domestic municipal corporation; or by a public officer in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question.⁴

4. Arrest, how Made.

Order, how Served.—The order of arrest, or, where it

¹ Code Civ. Pro., § 560.

² Lachenmeyer v. Lachenmeyer, 26 Hun, 542.

³ Code Civ. Pro., § 561.

⁴ Code Civ. Pro., § 1990.

was granted by the court, a certified copy thereof, subscribed by the plaintiff's attorney; and, in either case, the papers upon which the order was granted, with the undertaking, if any, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. The papers, upon which the order was granted, with the undertaking, if any, must be filed with the order of arrest, or a certified copy thereof, at the time prescribed for filing the same in section 590 of the Code of Civil Procedure.¹

The sheriff must execute the order by arresting the defendant, if he is found within his county, and keeping him in custody until discharged by law.²

Arrest; how, when, and where made.—To constitute an arrest, an actual manual touching of the body is not required, but only whatever is equivalent amounting to a restraint of liberty of the person. That the party is within the power of the officer, and submits to the arrest, is sufficient.³ But the mere reading a warrant to the defendant named in it, and directing him to appear before the magistrate at the time named, is not an arrest; and a defendant, who, on such notice, attends and confesses judgment, cannot complain of duress.⁴ An officer, duly appointed and qualified, and authorized by a warrant to arrest, gives sufficient notice of his authority to do so by reading the warrant of arrest.⁵

The officer, having the order of arrest, should serve it, and make the arrest, if the defendant can be found in the county in which process is issued, within a reasonable time after the order or warrant is delivered to the officer. But the officer has the right to select such particular time of day as he thinks most expedient under the circumstances, and is authorized to make use of so much force as is necessary to accomplish the object.⁶

The sheriff, or other officer, may make the arrest in any

¹ Code Civ. Pro., § 562.

² Code Civ. Pro., § 563.

³ *Searls v. Viets*, 2 Thomp. & C., 224; *Gold ads. Bissell*, 1 Wend., 211; *Strout v. Gooch*, 8 Greenl., 127.

⁴ *Baldwin v. Murphy*, 82 Ill., 485.

⁵ *State v. Green*, 65 Mo., 631.

⁶ *Adams v. Freeman*, 9 Johns., 117; *Wright v. Keith*, 11 Shep. (Ala.), 158.

part of the county, and in any place, house or building. But a dwelling-house is a protection from arrest, *in civil process*, to the occupant, his children, and domestic servants and permanent lodgers and boarders, so long as the outer door or window is so closed that the officer with the process must forcibly open the same to gain admittance. If the outer door or window be closed by so little as a common latch, the officer may not force open the same to arrest one of them on civil process. This immunity does not, however, extend to strangers and visitors in the dwelling-house.¹

If the sheriff have peaceably entered the dwelling through any outer opening, he may then break open any inner door, closet, chest or other inclosure, and arrest any person within the dwelling, whose arrest his process commands him to make, without any demand being made for admittance. If, however, the officer has no reasonable ground for believing the defendant is secreted in the house or room in which he desires to enter, he should always make a demand for admittance.² If an arrest has been made, and the person arrested escapes and takes refuge in his dwelling-house, the officer may break into the house in pursuit of him, without making known his business, demanding admission and receiving refusal.³ After demanding admittance and receiving a refusal, the sheriff may break open the outer door of any building, other than a dwelling-house, to arrest a defendant. But it must be remembered that, to prevent an entrance against the consent of the occupant, into a dwelling-house, to arrest, upon civil process, any person other than a stranger or visitor therein, it is sufficient if the outer door be closed. Then, merely opening it, is a breaking within the meaning of the law; and so all the books treat the matter. What would be a breaking of the outer door in burglary, is equally a breaking by the sheriff. Lifting a latch is, in law, just as much a breaking as the forcing of

¹ Oystead v. Shed, 13 Mass., 520; Curtis v. Hubbard, 4 Hill, 437.

² Lee v. Gansell, Cowp. 1; Semayne's Case, 5 Coke, 92; Ratcliff v. Burton, 3 Bos. & Pul., 228; Haggarty v. Wilber, 16 Johns., 287; Hubbard v. Mace, 17 id., 127.

³ Allen v. Martin, 10 Wend., 300; Oystead v. Shed, 13 Mass., 520.

a door bolted with iron.¹ Even sliding down a window fastened with pulleys, is such a breaking as would formerly cost a burglar his life,² and a sheriff entering a house in that way to execute civil process, would be a trespasser. But, in the execution of *criminal* process, he may break open the doors of a house, in the night as well as in the day time, after demand of admittance, and refusal.³ After notifying the owner of a dwelling-house that he has a criminal warrant, against a person therein, and demanding and being refused admission, the sheriff has the right to enter even the *outer* door of the house by force, for the purpose of serving the warrant, and he cannot be treated as a trespasser, merely because he has failed to notify the owner of the house whom the person sought to be arrested is, no inquiry having been made in relation thereto, even though the person sought for is not, in fact, there.⁴

What is a Dwelling-House?—A dwelling-house, by the Penal Code, for the purposes of its chapter on burglary, is defined to be any building, any part of which is usually occupied by a person lodging therein at night.⁵ And if a building is so constructed as to consist of two or more parts, intended to be occupied by different tenants usually lodging therein at night, each part is deemed the separate dwelling-house of a tenant occupying the same. If a building is so constructed as to consist of two or more parts, occupied by different tenants separately for any purpose, each part or apartment is considered a separate building.⁶ The mere casual use of a tenement as a lodging, or the using it only upon some particular occasions, will not be such a *usual occupation by a person lodging therein at night*, as will

¹ *Curtis v. Hubbard*, 1 Hill, 337; *Same v. Same*, 4 id., 437; *Penton v. Brown*, 1 Keb., 698; *Seymour v. Gresham*, Cro. Eliz., 908; *Biscop v. White*, id., 759; *Ratcliffe v. Burton*, 3 Bos. & Pull., 223; *Lee v. Gansel*, Cowp., 15; *Haggerty v. Wilbur*, 16 Johns., 288; *Buckenham v. Francis*, 11 Moore, 40; Penal Code, § 499.

² Russ. on Crimes (Amer. ed. of 1836), 5; Penal Code, § 499.

³ *State v. Smith*, 1 N. H., 346; *Bell v. Clapp*, 10 Johns., 263; *Commonwealth v. Reynolds*, 120 Mass., 190; *State v. Shaw*, 1 Root, 134; *Kelsey v. Wright*, id., 83.

⁴ *Commonwealth v. Reynolds*, 120 Mass., 190.

⁵ Penal Code, § 502.

⁶ Penal Code, § 503.

constitute such place a dwelling-house, as where a servant sleeps in a barn for some nights for the purpose of watching thieves, or where a porter lies in a warehouse to watch goods.¹ But the structure does not lose its character as a dwelling-house, by any temporary absence of its inhabitants, who have left it with the intent to return. A man may have two dwelling-houses, one of them used only occasionally during the year, yet the occupants of the latter could not be arrested on civil process, while the outer entrances are closed.² The building to be a dwelling-house must be substantially permanent, however; hence a tent or a booth, in a fair or a market, is not a dwelling-house, but a loft over a coach-house and stable is such, when so used; and so are chambers in college and the inns of court.³

If any part of a building, to every part of which there is internal communication, is an abiding place, the whole is a dwelling-house.⁴

Mr. Bishop, in his excellent work on statutory crimes, heretofore cited, after reviewing the authorities upon the subject, says: "If we look at these points in a philosophical way, provided anything can be called philosophical, which concerns a mere question of technical law, we shall find the following view to be more exact than can be given on a sole statement of points adjudged. The place in which a man and his family live, whether large or small, under one roof or many roofs, is his dwelling-house. If under one of his roofs are apartments of any sort, not occupied by him, they are no more his place of abode, than if they were under a separate roof. But suppose there is an internal communication from the rooms he uses to such apartments, then, if those apartments are not the dwelling-place of the other person who occupies them, they are his dwelling-place in a certain sense. Because the internal communication creates the exact hazard which would be created by a vacant room opening into the public way, on the one side, and into his room on the other side. If the apartments are used for a dwelling by the person occupying them, then, as they are

¹ Bishop on Statutory Crimes, § 279.

² Id.

³ Id., § 280.

⁴ Id.

such persons dwelling-house, they cannot be that of his neighbor.”¹ Again he says: “The conclusion is a broad one, that the abode extends only to buildings and rooms used either directly or indirectly for the purposes of habitation; with this single exception, that, where the walls of the dwelling inclose other premises, connected with the rooms lived in, by an internal communication, these other premises, while not the abode of another person, even though occupied by another, are parts of the dwelling-house with which they so connect.”²

5. *Prisoner, How Kept.*

To be Kept Safely.—A person arrested, by virtue of an order of arrest, in an action or special proceeding brought in a court of record; or of an execution issued upon a judgment rendered in a court of record; or surrendered in exoneration of his bail; must be safely kept in custody, in the manner prescribed by law, and, except as otherwise prescribed by sections 111 and 112 of the Code of Civil Procedure, at his own expense, until he satisfies the judgment rendered against him, or is discharged according to law.³

When at Expense of Plaintiff.—In the county of Kings, when the sheriff has actually confined in jail a prisoner so arrested or surrendered, he must serve upon the plaintiff's attorney, as prescribed by law for the service of a paper upon an attorney in an action, a written notice, stating that he has so confined the prisoner, and that the plaintiff is required to make the payments specified in this section, in default whereof the prisoner will be discharged. Within three days after service of the notice, or six days, if the service is by mail, the plaintiff must pay to the sheriff the sum of twenty-five dollars, for the support of the prisoner for the first twenty-days, after his actual confinement in jail, unless in the meantime he is discharged or admitted to the jail liberties. At or before the expiration of each subsequent period of twenty days, during which the prisoner has been so confined, the plaintiff must pay a like sum to

¹ Bishop on Statutory Crimes, § 282.

² Id., § 283; Williams v. Spencer, 5 Johns., 352; Fitch v. Loveland, Kirby, 386.

³ Code Civ. Pro., § 110.

the sheriff, for the prisoner's support during the ensuing twenty days. If a payment required by this section is not made, the prisoner must be discharged. The sheriff must apply all the money so paid to the support of the prisoner, unless he is admitted to the jail liberties or discharged; in which case he must refund to the plaintiff's attorney a ratable portion of the last payment, according to the period of time, during which the prisoner was so confined.¹

When at Expense of County.—In any county, except Kings, if a prisoner, actually confined in jail, makes oath before the sheriff, jailer, or deputy-jailer, that he is unable to support himself during his imprisonment, his support is a county charge.²

Sheriff not to Charge for Drink, etc.—A sheriff or other officer shall not charge a person, whom he has arrested, with any sum of money, or demand, or receive from him money, or any valuable thing, for any drink, victuals or other thing, furnished or provided for the officer, or for the prisoner, at any tavern, ale-house, or public victualing or drinking-house.³

Not to Demand Gratuity.—A sheriff or other officer shall not demand or receive from a person, arrested by him, while in his custody, a gratuity or reward, upon any pretense, for keeping the prisoner out of jail; for going with him or waiting for him to find bail, or to agree with his adversary; or for any other purpose.⁴

How Kept in House Other Than Jail.—If a person arrested is kept in a house, other than a jail of the county, the officer arresting him, or the person in whose custody he is, shall not demand or receive from him any greater sum, for lodging, drink, victuals or any other thing, than has been heretofore prescribed by the court of sessions of the county; or, if no rate has been prescribed by the court of sessions, than is allowed by a justice of the peace of the same town or city, upon proof that the lodging or other thing was actually furnished, at the request of the prisoner. And such an officer or person shall not, in any case or upon any pretext, demand or receive compensation for strong, spirituous

¹ Code Civ. Pro., § 111.

² Code Civ. Pro., § 112.

³ Code Civ. Pro., § 113.

⁴ Code Civ. Pro., § 115.

or fermented liquor, or wine, sold or delivered to the prisoner.¹

What Prisoner may Send for.—A prisoner so kept in a house, may send for and have beer, ale, cider, tea, coffee, milk and necessary food, and such bedding, linen and other necessary things, as he thinks fit, from whom he pleases, without detention of the same, or any part thereof by, or paying for the same, or any part thereof to, the officer arresting him, or the person in whose custody he is.²

Nothing for Rent of Jail, etc.—A sheriff, jailor or other officer, shall not demand or receive money, or any valuable thing, for chamber rent in a jail; or any fee, compensation or reward, for the commitment, detaining in custody, release or discharge of a prisoner, other than the fees expressly allowed therefor by law.³

Exemption From Arrest of Officer and Prisoner.—A sheriff or other officer, who has lawfully arrested a prisoner, may convey his prisoner through one or more other counties, in the ordinary route of travel, from the place where the prisoner was arrested, to the place where he is to be delivered or confined.⁴

And a prisoner so conveyed, or the officer having him in custody, is not liable to arrest in any civil action or special proceeding, while passing through another county.⁵

6. Order for Arrest, How Vacated.

Except where an order of arrest can be granted only by the court, the defendant, may, at any time before final judgment; or, if he was arrested within twenty days before final judgment, at any time within twenty days after the arrest, apply to vacate the order of arrest; or to reduce the amount of bail; or to increase the security given by the plaintiff; or for one or more of those forms of relief, together, or in the alternative. In a case where the order of arrest can be granted only by the court, a like application may be made, at any time within twenty days after the arrest; and an application to

¹ Code Civ. Pro., § 115.

⁴ Code Civ. Pro., § 118.

² Code Civ. Pro., § 116.

⁵ Code Civ. Pro., § 119.

³ Code Civ. Pro., § 117.

increase the security given by the plaintiff, may be made at any time before final judgment.¹ Such application may be founded only upon the papers upon which the order was granted ; in which case it must be made to the court, or, if the order was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper ; and the application must be heard upon those papers only. Or it may be founded upon proof, by affidavit, on the part of the defendant : in which case it must be made to the court, or, if the order was granted by a judge out of court, to any judge of the court, upon notice ; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground of arrest recited in the order, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings ; in which case the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.²

Prisoner, How Discharged.—Except in a case where an order of arrest can be granted only by the court, if the defendant is in actual custody, by virtue of an order of arrest in the action, or upon a surrender in exoneration of his bail, and the plaintiff neglects to enter judgment in the action, within one month after it is in his power to do so ; or neglects to issue execution against the person of the defendant, within three months after the entry of judgment ; or if the surrender was made after the judgement, within three months after the bail are exonerated thereupon, the defendant must, upon his application, made upon notice to the plaintiff, be discharged from custody by the court in which the action was commenced, or by a judge thereof, within the county where the defendant is in custody ; unless reasonable cause is shown why the application should not be granted. A defendant thus discharged shall not be arrested upon an execution issued upon a judgment in the action.³

¹ Code Civ. Pro., § 567.

² Code Civ. Pro., § 568.

³ Code Civ. Pro., § 572, as amended in 1882.

7. *Bail.*

When Bail may be Given.—The defendant, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and to procure bail, before being committed to jail.¹

The prisoner must be freed from the arrest upon tendering to the sheriff, or other officer, arresting him, a bond, with sufficient sureties. If the sheriff refuse to accept such bond, or acts oppressively, he is liable to an action. The action should be brought, not against the officer who refuses to accept it, but against the sheriff.² Where the defendant is actually confined in the jail, by virtue of an order of arrest, and final or interlocutory judgment has been rendered against him in the action, but an execution against his person has not been issued, he may elect either to give a bond for the liberties of the jail, or to give bail or make a deposit.³

If a defendant, who has been arrested, is prejudiced by the delay of the plaintiffs in entering judgment, he may compel them to charge him in execution, but if he fails to move for that purpose, he cannot charge them with laches.⁴

Bail, how Given.—The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence and occupations, to the following effect:

1. If the order of arrest could be granted only by the court, that the defendant will obey the direction of the court, or an appellate court, contained in an order or a

¹ Code Civ. Pro., § 573.

² *Richards v. Porter*, 7 Johns., 137; *Posterne v. Hanson*, 2 Saund., 59, 61, e 5; *Smith v. Hall*, 2 Mod. R., 32; *Arteaga v. Flack*, Ct. App., 1882, reported 25 Alb. L. J., 412.

³ Code Civ. Pro., 574.

⁴ *Carter v. Loomis*, 2 Abb. (N. S.), 295.

judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.

2. If the action is to recover a chattel, that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

3. In any other case, that the defendant will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment against him in the action.¹

A party, at whose suit an arrest is made, may take any security he pleases on discharging his debtor from arrest, but an officer can take only that prescribed by statute.² If an unauthorized security is designedly taken by the officer, it is void, as having been taken *colore officii*, although the officer may not have designed to violate the law.³

Examination of Persons Offered as Bail.—It is not necessary that the undertaking should be approved, or accompanied with an affidavit of justification of the bail. But the officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine, under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and annexed to the undertaking.⁴

Filing, etc., of Papers; Plaintiff's Acceptance or Rejection of Bail.—Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney copies, certified by him, of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail, otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability.⁵

¹ Code Civ. Pro., § 575; *McKenzie v. Smith*, 48 N. Y. (3, Sick.), 143; *Clapp v. Schutt*, 44 id. (5 Hand), 104.

² *Decker v. Judson*, 16 N. Y. (2 Smith), 439, 443; *Winter v. Kinney*, 1 id. (1 Comst.), 365.

³ *Cook et al. v. Freudenthal*, 80 N. Y., 202.

⁴ Code Civ. Pro., § 576, as amended by Laws of 1879, chap. 542.

⁵ Code Civ. Pro., § 577, as amended by Laws of 1879, chap. 542.

Notice of Justification, etc.—Within ten days after the receipt of the notice, the sheriff or the defendant may serve upon the plaintiff's attorney, notice of the justification of the same or other bail, specifying the place of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where one of the bail resides, or where the defendant was arrested. If other bail are given, a new undertaking must be executed, as prescribed in section 575 of the Code of Civil Procedure.¹

Qualifications of Bail.—The qualifications of bail are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the State.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail.²

Justification of Bail.—For the purpose of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge in his discretion thinks proper. The judge may, in his discretion, adjourn the examination from day to day, until it is completed; but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the plaintiff's attorney, the examination must be reduced to writing, and subscribed by the bail.³

Allowance of Bail.—If the judge finds the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability.⁴

Deposit With Sheriff.—The defendant may, instead of

¹ Code Civ. Pro., § 578.

³ Code Civ. Pro., § 580.

² Code Civ. Pro., § 579.

⁴ Code Civ. Pro., § 581.

giving bail, deposit with the sheriff the sum specified in the order. The sheriff must thereupon give the defendant a certificate of the deposit, and discharge him from custody.¹

Payment of, Into Court.—The sheriff must, within four days after the deposit, pay it into court. He must take, from the officer receiving it, two certificates of the payment, one of which he must deliver to the plaintiff, and the other to the defendant. For a default in making the payment, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.²

Substituting Bail for Deposit.—If money is deposited, bail may be given, and may justify upon notice, at any time before the expiration of the right to be discharged on bail. Thereupon the judge, before whom the justification is had, must direct, in the order of allowance, that the money deposited be refunded to the defendant, or his representative, and it must be refunded accordingly.³

Deposit, How Disposed of.—If money deposited is not refunded, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case, if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied, under the direction of the court, in satisfaction of the judgment; and the surplus, if any, must be refunded to the defendant, or his representative. If the final judgment is for the defendant, or the action abates, or is discontinued, the sum deposited, and remaining unapplied, must be refunded to the defendant or his representative.⁴

When Deposit Paid to Third Person.—At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction, to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof; but without expressing any other contingency. The direction must be acknowledged or proved, and certified in like manner as a deed to be recorded; and the sheriff must deliver it to the officer who receives the deposit, who must note the substance

¹ Code Civ. Pro., § 582.

² Code Civ. Pro., § 584.

³ Code Civ. Pro., § 583.

⁴ Code Civ. Pro., § 585.

thereof, with the entries of the deposit, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to the plaintiff's interest therein, and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying or defrauding creditors. The money, or the residue thereof, must be paid to the third person, where, by the provisions of the last two sections cited, it is required to be refunded to the defendant, or his representative.¹

When Sheriff Liable as Bail.—If, after the defendant is arrested, he escape or is rescued, or the bail, if any, given by him, do not justify when they are not accepted, or if the sheriff fails to pay the deposit into court, as required by section 583 of the Code of Civil Procedure, the sheriff is liable as bail. But the sheriff may, except in an action to recover a chattel, discharge himself from liability, by the giving and justification of bail, as follows:

1. If the case is one where the order could be granted only by the court, at any time before the court directs the performance of the act specified in the order.

2. In any other case, at any time before an execution is issued against the person of the defendant, upon a judgment in the action.²

Proceedings on Judgment Against Sheriff.—If judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.³

Bail Liable to Sheriff.—The bail taken upon the arrest, unless they justify, or other bail are given and justify, are liable to the sheriff for all damages, which he sustains by reason of the omission.⁴ But the bail are not liable to the sheriff on their undertaking. They are liable because they gave the undertaking and have failed to justify, and have thus damnified the sheriff.⁵

Papers to be Filed.—Within ten days after the defendant is arrested, if he does not give bail, or, if he gives bail,

¹ Code Civ. Pro., § 586.

⁴ Code Civ. Pro., § 589.

² Code Civ. Pro., § 587.

⁵ *Clapp v. Schutt*, 44 N. Y., 104.

³ Code Civ. Pro., § 588.

within ten days after the justification of the bail, the sheriff must file with the clerk the order of arrest, or, where it was granted by the court, the certified copy thereof delivered to him, with his return thereupon indorsed, the papers upon which the order of arrest was granted, and the undertaking given on the part of the plaintiff. Where an order of arrest, directing the arrest of two or more defendants, has been executed as to one or more, but not as to all of them, the sheriff may file a copy of the order of arrest, instead of the original.¹

Charging and Discharging Bail; when Defendant may be surrendered.—Except in an action to recover a chattel, the bail may surrender the defendant in their own exoneration, or the defendant may surrender himself in exoneration of the bail, before the expiration of the time to answer, in an action against them. The surrender must be made to the sheriff of the county, where the defendant was arrested.²

Surrender, how Made, and Exoneration Thereupon.—Where the bail surrender the defendant, the surrender must be made in the following manner :

1. They must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody.

2. A certified copy of the undertaking of the bail must be delivered to the sheriff, who must detain the defendant in his custody thereupon, as upon the original mandate, and must, by a certificate in writing, acknowledge the surrender. Upon the application of the bail, made upon notice to the plaintiff's attorney, and upon production of the sheriff's certificate and a copy of the undertaking, a judge of the court, or the county judge of the county where the action is triable, may make an order, directing that the bail be exonerated. On filing the order and the papers used on the application therefor, the bail are exonerated accordingly.³

Bail may Arrest Defendant.—For the purpose of surrendering the defendant, the bail, at any place or at any

¹ Code Civ. Pro., § 590, as amended by Laws of 1879, chap. 542.

² Code Civ. Pro., § 591.

³ Code Civ. Pro., § 592.

time before they are finally charged, may themselves arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower another person to do so, and one or more of the bail may thus arrest and surrender the defendant, although the others do not join with him or them for that purpose.¹

Voluntary Surrender.—Where the defendant surrenders himself in exoneration of his bail, he must present himself to the sheriff, and require the sheriff, in writing, to take him into custody, in exoneration of his bail. The sheriff must detain him accordingly, as prescribed in subdivision second of section 592 of the Code of Civil Procedure; and if requested by the bail, at any time after the surrender, the sheriff must, by a certificate in writing, acknowledge the surrender. An order for the exoneration of the bail may be procured, as prescribed in section 592 of said Code.²

Rights of Sheriff when Liable as Bail.—Where the sheriff is liable as bail, he has all the rights and privileges, and is subject to all the duties and liabilities of bail; and bail, given by him, in order to discharge himself from liability, must be regarded as the bail of the defendant in the action. But this does not apply to an action to recover a chattel, or to a case where a defense arises to an action against the bail, in consequence of an act or omission of the sheriff.³

In case of failure to comply with the undertaking, the bail may be proceeded against by action, and not otherwise.⁴

What Necessary Before Action Against Bail.—An action may be brought, as prescribed in the last section cited, in a case where the order of arrest could be granted only by the court, at any time after the bail have failed to comply with their undertaking. Where the undertaking was given in an action to recover a chattel, an action may be brought thereupon, at any time after the return, wholly or partly unsatisfied, of an execution for the delivery of the possession of the chattel, with respect to which the order of arrest was granted. In any other case an action cannot be brought,

¹ Code Civ. Pro., § 593.

² Code Civ. Pro., § 595.

³ Code Civ. Pro., § 594.

⁴ Code Civ. Pro., § 596.

as prescribed in said section, until the following requisites have been complied with :

1. An execution, against the property of the defendant, must have been issued to the sheriff of the county in which he was arrested, and returned by that sheriff, wholly or partly unsatisfied.

2. An execution, against the person of the defendant, must have been issued to the same sheriff, and by him returned, not less than fifteen days after its receipt, to the effect that the defendant could not be found within his county.¹

Duty of Sheriff.—The sheriff must diligently endeavor to serve an execution issued and delivered to him, as prescribed in the last section cited, notwithstanding any direction he may receive from the plaintiff or his attorney.²

Defenses of Bail.—In an action against bail, it is a defense, that an execution, against the property, or against the person of the defendant in the original action, was not issued as prescribed in the said section ; or that it was not issued in sufficient time to enable the sheriff to serve it ; or that a direction was given, or other fraudulent or collusive means were used by the plaintiff or his attorney, to prevent the service thereof.³

Relief of Bail.—If the defendant in the original action, after his discharge upon bail, is imprisoned, either within or without the State, upon a criminal charge, or a conviction of a criminal offense, the court, in which the action against the bail is pending, may, before the expiration of the time to answer, and upon notice to the adverse party, make such an order for the relief of the bail as justice requires.⁴

Bail, How Exonerated.—Except in an action to recover a chattel, the bail must be exonerated where either of the following events occurs, before the expiration of the time to answer in an action against them :

1. The death of the original defendant.
2. His legal discharge from the obligation to render him-

¹ Code Civ. Pro., § 597.

³ Code Civ. Pro., § 599.

² Code Civ. Pro., § 598.

⁴ Code Civ. Pro., § 600.

self amenable to the process, direction or proceedings, with respect to which the undertaking of the bail was made.

3. His surrender to the sheriff of the county where he was arrested.

Where either event occurs, after the commencement of the action against the bail, the court may, in its discretion, impose the payment of the plaintiff's costs and expenses, incurred after the return of the execution against the person, as a condition of allowing the exoneration. And the court may, by an order, made upon notice to the adverse party, grant such further time as it deems just, after answer, for the surrender of the original defendant. In that case, his surrender, within the time so granted, has the same effect as if it had been made before answer.¹

The provisions of the Code of Civil Procedure relating to the rights and duties of the sheriff as to arrest and bail, are so explicit that comment is unnecessary. As to his liabilities as bail, more will be said in a subsequent chapter.

SECTION III.

ATTACHMENT OF PROPERTY.

1. *Warrant of, when Granted.*

In what Actions Granted.—A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in section 636 of the Code, where the action is to recover a sum of money only, as damages, for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.

2. Wrongful conversion of personal property.

3. Loss of, or damage or injury to, personal property, in consequence of negligence, fraud, or other misconduct.²

What Shown to Procure Warrant.—To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

¹ Code Civ. Pro., § 601.

² Code Civ. Pro., § 635.

1. That one of the causes of action specified in section 635 of the Code exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation, or not a resident of the State ; or, if he is a natural person and a resident of the State, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent ; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the State, with intent to defraud his or its creditors ; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent.¹

In Action Against Public Officer.—A warrant of attachment, against the property of one or more defendants in an action, may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only ; and it appears, by affidavit, that the action is brought to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of ; or in the obtaining, reception, payment, conversion, or disposition of which, without right, he has aided or abetted ; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same ; or the aiding or abetting thereof. In order to entitle the plaintiff to a warrant of attachment, in a case here specified, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant, for a sum stated in the affidavit.²

¹ Code Civil Pro., § 636.

² Code Civ. Pro., § 637.

Counterclaim.—Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment, against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment; and for the purpose of applying to such a case the provisions of the Code of Civil Procedure, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim, so set forth in the answer, is deemed the complaint.¹

When and by whom Granted.—The warrant may be granted by a judge of the court, or by a county judge, to accompany the summons, or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor as the Code prescribes; and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof.²

Filing Affidavits.—The plaintiff procuring the warrant must, within ten days after the granting thereof, cause the affidavits, upon which it was granted, to be filed in the office of the clerk.³

Security.—The judge, before granting the warrant, must require a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs, which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least \$250. But this does not apply to a case where the action is brought for a cause specified in section 637 of the Code, or where it is specially

¹ Code Civ. Pro., § 720.

² Code Civ. Pro., § 639.

³ Code Civ. Pro., § 638.

prescribed by law that security may be dispensed with, or where the security to be given is specially regulated by law.¹

Contents of Warrant.—The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed either to the sheriff of a particular county; or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time, to sheriff's of different counties.*

It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.³

2. Warrant, How Executed.

Sheriff Must Attach Property.—The sheriff must immediately execute the warrant, by levying upon so much of the real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, and of the personal property of the defendant, not exempt in like manner, which he finds within his county, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers and other papers relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of as prescribed by law. The sheriff, to whom the warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount for which it was issued has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.⁴ But the power to levy by virtue of an attachment, does not survive the recovery of judgment in the action, and

¹ Code Civ. Pro., § 640.

² Code Civ. Pro., § 641.

³ Code Civ. Pro., § 642.

⁴ Code Civ. Pro., § 644.

no new right or interest in the property of the defendant can be thereafter acquired under it.¹

The real property which may be levied upon, by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant.²

It is impossible that the sheriff can be mistaken as to what real property may be attached. He needs to ascertain only if the defendant has an interest in the real property which he could dispose of. If he finds that the defendant has such an interest, he should attach the interest. New York citations are unnecessary. It perhaps would be of interest to glance at some late decisions in other States upon the subject. We find it held in different States, that an attachment may be levied upon land, although the debtor only holds the equitable title, and the legal title is in another.³ But an attachment upon land, as the property of the defendant, will be intended as attaching a legal interest. If the defendant has only an equity, a sale under such attachment will convey no title.⁴ In order to subject an equitable interest in land, by attachment in a court of equity, the bill must be framed with that view.⁵ Nor can an attachment be made to operate upon a merely legal title, as against the equitable owner of real estate, where the parties claiming under the attachment, have taken at the time the attachment is levied, or are bound by law to take notice of the paramount outstanding equitable title.⁶ A tenancy by the curtesy initiate, is not subject to attachment in Rhode Island for the husband's debts.⁷ In West Virginia the undivided interest of a tenant in common, may be levied upon and sold under an attachment in equity, and this without making the co-tenants parties.⁸ In Massachusetts, the right to

¹ *Lynch v. Crary*, 52 N. Y., 181; S. C., 14 Abb. (N. S.), 85.

² Code Civ. Pro., § 645.

³ *Bullene v. Hiatt*, 12 Kan., 98; *Jenkins v. Jackson*, 8 Bush. (Ky.), 373; *Moore v. Quint*, 44 Vt., 97.

⁴ *Lane v. Marshall*, 1 Heisk. (Tenn.), 30.

⁵ *Hillman v. Werner*, 9 Heisk. (Tenn.), 586.

⁶ *Tucker v. Vandermark*, 21 Kan., 263.

⁷ *Greenwich Nat. Bank v. Hall*, 11 R. I., 124.

⁸ *Curry v. Hale*, 15 W. Va., 867.

redeem land from a tax-sale, is not attachable in an action at law.¹ One who occupies land under a contract of purchase, with the right to cut and sell wood growing thereon, upon condition of accounting to the owners, for the receipts, after reimbursing his expenses, has no attachable interest in the wood.²

Where a testator left all his property to his widow, to be used by her for the support and education of their children, allowing her at any time to advance, at her discretion, a portion of the estate among the children, it was *held* that the children had no such vested interest in the estate, as to be subject to attachment by their creditors.³

The levy of an attachment upon real estate, after the defendant in the attachment has conveyed by deed, is ineffectual as against the grantee in the deed. The facts that the deed has not been recorded, and the attaching creditor had no notice of the sale, are immaterial. For the registry or recording does not protect attaching creditors, but only purchasers or mortgagees for value, from an unrecorded deed.⁴

Unpaid Subscription to Foreign Corporation.—Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.⁵

Interest in Corporation.—The rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon, and the sheriff's certificate of the sale thereof, entitles the purchaser to the same rights and privileges with respect

¹ *Adams v. Mills*, 126 Mass., 278.

² *Provis v. Cheves*, 9 R. I., 53.

³ *Sturm v. White*, 8 Baxter (Tenn.), 197.

⁴ *Plant v. Smythe*, 45 Cal., 161.

⁵ Code Civ. Pro., § 646; *Pease v. Underwriters Union*, 1 Ill. App., 287; *Peterson v. Sinclair*, 83 Penn. St., 250.

thereto, which the defendant had when they were so attached.¹

Whether corporate shares may be garnisheed for debts of the stockholder, depends altogether upon the statute. In Virginia, they may be in law or in equity.² Shares in a corporation must be attached by leaving a copy of the warrant, and a notice showing the property levied on, with an officer of the corporation.³

Bond, Negotiable Paper, etc.—The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, in terms negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, State, county, public officer, association, municipal or other corporation, or by a private person, either within or without the State; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.⁴

*Attachable Property Generally.*⁵—Judgment debts and moneys collected on execution, by and in the hands of a sheriff, are liable to attachment under process issued in an action against the judgment creditor. The right so to at-

¹ Code Civ. Pro., § 647.

² Chesapeake etc. R. R. Co. v. Paine, 29 Gratt. (Va.), 502. As to what stocks and dividends are liable to garnishment under the Tenn. Code, §§ 1481, 3090, 3097; see Montidonic v. Page, 10 Heisk. (Tenn.), 443.

³ Code Civ. Pro., § 649, subd. 3; The Mechanics' and Traders' Bank of Jersey City v. Dakin, 50 Barb., 587. This case was reversed, see S. C., 51 N. Y., 519, but upon another point.

⁴ Code Civ. Pro., § 648; Clough v. Buck, 6 Neb., 345; Prout v. Grout, 72 Ill., 456; Hearne v. Keath, 63 Mo., 84.

⁵ See Conover v. Ruchman, 32 N. J. Eq., 685; Abernathy v. Whitehead, 69 Mo., 28; Crawford v. Coil, id., 588; State v. Thomas, 7 Mo. App., 205; Continental Bank v. Draper, 89 Penn. St., 446; Starnes v. Allen, 58 Ala., 316; Conway v. Armington, 11 R. I., 116; Nickerson v. Chase, 122 Mass., 296; Fesler v. Haas, 19 Kan., 216; Reifsnnyder v. Lee, 44 Iowa, 101; Couter v. McTouesten, 18 Kan., 476; Wilder v. Shea, 13 Bush. (Ky.), 128; Keyser v. Rice, 47 Md., 203; Warren v. Sullivan, 123 Mass., 283; Kane v. Clough, 36 Mich., 436; Rodman v. Musselman, 12 Bush. (Ky.), 354; Ware v. Gowen, 65 Me., 534; Zimmer v. Davis, 35 Mich., 39; McKelvay v. So. Car. R. R. Co., 6 Rich. (S. C.), 446; Moyer v. Chat. Nat. Bank, 51 Ga., 325.

tach, is not affected by the fact that the judgment debtor is also the attaching creditor.¹

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure, shall be served or levied upon articles, goods, wares, merchandise, or property of any description while the same is en route to or from, or while on exhibition, or deposited by exhibitors at any international exhibition, held under the auspices or supervision of the United States, within any city or county of this State, nor shall such property be subject to attachment, seizure, levy or sale, for any cause whatever, in the hands of the authorities of such exhibition, or otherwise.² Property held in trust, under a verbal agreement, for the purpose of compromising with creditors, is attachable as the property of the person indebted, until it is actually turned over pursuant to a compromise.³ But property held by an assignee, under a valid assignment, for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts.⁴

It is provided, generally, in section 644 of the Code of Civil Procedure, that any property subject to levy on execution is liable to be seized on attachment. Hence, it has been held that the sheriff, in executing a warrant of attachment upon the interest of one of several copartners for his individual debt, might seize the entire leviable property of the copartnership.⁵ But the Code has provided a way by which the attachment on the entire property may be discharged,⁶ of which more specific mention will be made hereafter. Where partners are sued on a firm debt, and an attachment is issued against one only, on the ground of his non-residence, and this attachment is levied on the partner-

¹ *Wehle v. Conner*, 83 N. Y., 231.

² *Laws of 1880*, chap. 393.

³ *Lynch v. Crary*, 34 N. Y. Supr. Ct., 461.

⁴ *Schlueter v. Raymond*, 7 Neb., 281; and see *Maduel v. Monsseaux*, 29 La. Ann., 228; see *Klinck v. Kelly*, 63 Barb., 622.

⁵ *Smith v. Orser*, 42 N. Y., 132; *Marshall v. McGregor*, 59 Barb., 519; *Knerr v. Hoffman*, 65 Penn. St., 126; *Stevens v. Stevens*, 39 Conn., 474; *Atkins v. Saxton*, 77 N. Y., 195; but see *Ursuline Nuns v. Connolly*, 22 La. Ann., 51; *Johnston v. Mathews*, 32 Md., 363; *Patterson v. Trumbull*, 40 Ga., 104; *Myers v. Smith*, 29 Ohio St., 120; *Ives v. Van Spyce*, 81 Ill., 120.

⁶ *Code Civ. Pro.*, § 693, *et seq.*

ship goods—it holds only the interest of the non-resident partner after payment of all partnership debts; and if the firm is, in fact, insolvent, it holds nothing.¹

A provision in a bill of sale that part of the purchase money may be paid to the creditors of the vendor, does not create a trust, in the absence of an agreement on the part of the vendee, to make such payment; the unpaid balance still remains due to the vendor, and may be reached by attachment in a suit against him.²

Levy, how made.—A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address, and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect as a notice of the pendency of an action.

2. Upon personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interest or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof.³

¹ *Doane v. Lindsay*, 42 N. Y. Supr. Ct., 399; and see *Taylor v. Kehlor*, 28 La. Ann., 530.

² *Kelly v. Babcock*, 49 N. Y., 318.

³ Code Civ. Pro., § 649; see, as to real estate, Md. Code, art. 75, § 99; Md. act of 1868, chap. 471, § 212; Mass. Gen. Stats., chap. 123, §§ 53-56; *Sykes v.*

Upon Real Estate.—For the purpose of a levy of an attachment upon real estate, it is not necessary that the officer should go upon, or even see the land.¹ And before the Code enactment, the statutes and the decisions until 1871, were silent as to what particular acts were necessary to constitute the seizure of real estate, under an attachment. By the Code, the particular acts required are specifically and unmistakably pointed out.² Before the Code of Civil Procedure, it had been held that the seizure of real estate, under an attachment, could require nothing more than the doing of some act by the officer, with intent to make the property liable to the process.³ The Code of Civil Procedure recognizes the rule, and for the information of the officers, specifies the particular act by which he should show his intent. It would seem, however, that in Louisiana, to constitute a valid seizure of a plantation cultivated as such, the sheriff must take the property into his possession and custody.⁴ A sheriff does not acquire a special ownership in real property by levying an attachment thereon. The only effect of such levy is to create a lien upon the real property, in favor of the attaching creditor, from the date of the levy.⁵ The same is true as to personal property. Hence the officer must attach, if possible, sufficient property to make the debt and costs. He, and he alone, is the judge of the amount of property which should be attached, and he is responsible to both parties for the exercise of a sound and reasonable discretion, in the performance of his duty.⁶

Upon Personal Property Capable of Manual Delivery.—Personal property, seized by the sheriff under a warrant of

Keating, 118 Mass., 517; Carleton v. Ryerson, 59 Me., 438; Guernsey v. Reeves, 58 Ga., 290; French v. Lord, 69 Me., 537; Ga. Code, § 3293; Reid v. Tucker, 56 Ga., 278; Conn. Gen. Stat., 402, § 4; Wales v. Clark, 43 Conn., 183. Coffin v. Smith, 51 Vt., 140; Brooks v. Farr, id. 396; Huxley v. Harrold, 62 Mo., 516, Moore v. Kidder, 55 N. H., 488.

¹ Burkhardt v. McClellan, Ct. App., March, 1862; 15 Abb. Pr., 243, note; cited in Rodgers v. Bonner, 45 N. Y., 382; Leonard v. Vandenburg, 8 How. Pr., 77; Perrin v. Everett, 13 Mass., 128; Hancock v. Henderson, 45 Tex., 479.

² Code Civ. Pro., § 649, subd. 1; see Mass. Gen. Stats., chap. 123, §§ 53-56; Sykes v. Keating, 118 Mass., 517.

³ Rodgers v. Bonner, 45 N. Y., 379, aff'g S. C., 55 Barb., 9.

⁴ Kilbourne v. Trellsen, 22 La. Ann., 207.

⁵ State v. Cornelius, 5 Oreg., 46.

⁶ Fitzgerald v. Blake, 42 Barb., 513; Ransom v. Halcott, 18 id., 56.

attachment, must, if capable of manual delivery, be taken into his actual custody and possession.¹ An officer's attempt to make an attachment of personal property, merely from information given by the debtor, while none of it was in sight, is not a valid levy.² Unless the property be taken into his custody, he does not acquire a special property therein.³ Hence the service of a copy of the warrant on the person in charge of goods, and informing him of the character of the papers, without any further steps being taken, is ineffectual.⁴ In Massachusetts, it has been held that it is sufficient, if the officer inform the owner of the goods that he has attached them, and forbids their removal.⁵ It may be that this is a taking into custody, but the safer course is for the officer to actually take the goods, or the key of the room wherein they are locked. An officer charged with the levy of the attachment upon a stock of goods in a store, has a right to enter the store and remain as long as is reasonably necessary for making a proper attachment. But he has no right to exclude the owner from the store beyond such time.⁶ The sheriff may insure attached property against loss;⁷ may retake it, if taken from his possession; but he cannot use it, except as required for the due execution of the attachment.⁸

Besides taking the property into his possession, the sheriff must, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the war-

¹ Code Civ. Pro., § 649, subd. 2; *McGinn v. Ross*, 11 Abb. Pr. (N. S.), 20; *Cooper v. Reynolds*, 10 Wall. (U. S.), 308; *Lanning v. Streeter*, 57 Barb., 33; *Pelham v. Rose*, 9 Wall. (U. S.), 103; *McLemore v. Cole*, 43 Ala., 620; *Yale v. Matthews*, 20 How. Pr., 430; *Smith v. Orser*, 43 Barb., 187; *Bray v. McClury*, 55 Mo., 128.

² *Conell v. Scott*, 5 Baxter (Tenn.), 595; and see *Brooks v. State*, id., 607; *Culver v. Rumsey*, 6 Ill. App., 598; *Rodgers v. Bonner*, 45 N. Y., 379, aff'g S. C. 55 Barb., 9.

³ *State v. Cornelius*, 5 Oreg., 46; *Rodgers v. Bonner*, *supra*.

⁴ *Miles v. Brown*, 38 N. Y. Supr. Ct., 400.

⁵ *St. George v. O'Connell*, 110 Mass., 475; and see *Trounstein v. Rosenham*, 22 La. Ann., 525; *Rogers v. Gilmore*, 51 Cal., 309.

⁶ *Perry v. Carr*, 42 Vt., 50.

⁷ *White v. Madison*, 26 N. Y., 117; *Blodgett v. Adams*, 24 Vt.) 23.

⁸ *Hergman v. Dettlebach*, 11 How. Pr., 46.

rant, and of the affidavits upon which it was granted.¹ This requirement cannot be waived by the person in whose possession the property was found, unless he be the one against whom the attachment proceeds.²

Upon Personal Property Incapable of Manual Delivery.

—The attachment of personal property, not capable of manual delivery, is made by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interest or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof.³

A notice by the sheriff that he attaches all property, debts and effects, and all rights and shares of stock, etc., in the possession or under the control of the individual upon whom the notice is served, sufficiently shows the property levied upon. A particular description of the property and debts supposed to be in the possession of or owing by him, is not necessary for the party served, and would not more satisfactorily show to him the property intended to be reached. The individual served, necessarily knows better than the officer can know, the property and debts in his possession, or owing by him, subject to attachment.⁴ A notice by the sheriff that he attached all the bonds and mortgages and promissory notes belonging to the attachment debtor, in the possession of an individual, would be good without specifying the particular securities and the names of the debtors, and if, perchance, there should be

¹ Code Civ. Pro., § 649, last clause of subd. 2, added by chap. 542, Laws of 1879; *Phillips v. Germon*, 43 Iowa, 101; *Leonard v. Woodward*, 34 Mich., 514; *Vandergrift's Appeal*, 83 Penn. St., 126.

² *Phelps v. Boughton*; 27 La. Ann., 592.

³ Code Civ. Pro., § 649, subd. 3; see *Northern Central R. R. Co. v. Rider*, 45 Md., 24; *Ryan v. Burkham*, 42 Ind., 507; *Clark v. Chapman*, 45 Ga., 486; *Oscar v. Clough*, 52 Mo., 55; *Whitaker v. Jencks*, 9 R. I., 391.

⁴ *O'Brien v. Mechanics' and Traders' Fire Ins. Co.*, 56 N. Y., 52; S. C., 46 How. Pr., 429; 15 Abb. Pr. (N. S.), 222; *revers'g S. C.*, 45 How. Pr., 453; 14 Abb. Pr. (N. S.), 314; 35 N. Y. Supr. Ct., 70; *McGuin v. Ross*, 11 Abb. Pr. (N. S.), 20; *Drake v. Goodridge*, 54 Barb., 78.

but one bond and mortgage, and no promissory notes, the excessive claim would not vitiate.¹ But where the property is held by a corporation or association, the notice and other papers *must* be served upon one of the officers specified in subdivision three, section 649 of the Code of Civil Procedure. If they are left with any other person, who forwards them by mail, or in any other way places them in the possession of a proper officer upon whom they might have been served, yet the attachment is not properly executed.²

If a defendant, against whom an attachment issues, has on special deposit with a trust company, a box, containing securities, the court may order the sheriff to open the safe of the trust company, and take therefrom the box and securities and keep sufficient of the securities to satisfy the attachment.³ Indeed, in such case, it doubtless would be the duty of the sheriff so to do under his warrant without the special direction of the court. A debtor cannot, by the device of investing his funds in securities, and depositing them with a banking, or safe-deposit company, secure them against attachment.

The property of the principal in the proceeds of sales and collections in the hands of his agent is "property incapable of manual delivery," and can only be attached as prescribed in subdivision three of section 649 of the Code of Civil Procedure.⁴

The expression "property incapable of manual delivery," is applicable to property not only which, in its nature, is thus incapable of manual delivery, but also to that which has become so from its peculiar position, as where it is under pledge or consignment, with advances made upon the property.⁵

A levy effected by committing a trespass is bad ;⁶ and though an attachment, commanding the seizure of the defendant's property, specify what it is, and of what it con-

¹ O'Brien v. Mechanics', etc., Ins. Co., *supra*.

² Pardee v. Leitch, 6 Lans., 303; Detroit, etc., R. R. Co. v. Younghaus, 2 Mich. (N. P.), 143; Nat. Bank v. Lake Shore, etc., R. R. Co., 21 Ohio St., 221.

³ United States v. Graff, 67 Barb., 304; S. C., 4 Hun, 634.

⁴ Greentree v. Rosenstock, 61 N. Y., 583.

⁵ Clark v. Goodridge, 41 N. Y., 210.

⁶ Bailey v. Wright, 39 Mich., 96.

sists, the officer is not authorized to seize property of a like kind belonging to a third party, though the defendant has lately sold it.¹

A sheriff, having an execution in his hands, and thereafter receiving an attachment against the judgment creditor, may levy upon the judgment debt, and the attachment thereby will become a lien on the judgment debt and the execution. To make a valid levy, the sheriff need not serve upon himself the papers required by subdivision three section 649 of the Code. He cannot well serve papers upon himself, and as he must know all about the property attached, he has notice of all that is required.²

Certificate of Defendants Interest, when Furnished.—Upon the application of a sheriff, holding a warrant of attachment, the president, or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or incumbrances thereon; or the amount, nature, and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.³

When Person may be Examined.—If a person, to whom application is made, as prescribed in the last subdivision, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the warrant is issued,

¹ *Wilson v. Paulsen*, 57 Ga., 596.

² *Wehle v. Connor*, 69 N. Y., 546.

³ Code Civ. Pro., § 650.

and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.¹

Rights of Owner or Master of Vessel on Which Goods are Shipped.—Except as otherwise prescribed in the next subdivision, the owner or master of a vessel, on board of which goods of a defendant, against whom a warrant of attachment is issued, have been shipped for transportation, without re-shipment or transshipment in the State, to a port or place without the State, may transport and deliver them according to their destination, notwithstanding the warrant; unless the plaintiff, his agent or attorney, executes to the owner or the master of the vessel, a written undertaking, with sufficient sureties, in a sum specified therein, to pay him all expenses, damages and charges, which may be incurred by him, or to which he may be subjected, for unlading the goods from the vessel, and for all necessary detention of the vessel for that purpose. The undertaking must be approved, with respect to its form, the sum specified therein, and the sufficiency of the sureties, by a judge of the court, or the county judge of the county wherein the vessel is situated, or in the city and county of New York, by a judge of a superior city court within that city and county.²

Exception.—The last section cited does not apply, where the owner or master, before the shipment of the goods, had actual information of the granting of the warrant, or where he has, in any wise, connived at, or been privy to, the shipment thereof, for the purpose of screening them from legal process, or of hindering, delaying or defrauding creditors.³

Sheriff to Make Inventory.—The sheriff must, immediately after levying under a warrant of attachment, make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property upon which it was levied, and of the books, vouchers and other papers taken into his custody,

¹ Code Civ. Pro., § 651; *Buckingham v. White*, 25 Hun, 441; *Hall v. Brooks*, id., 577.

² Code Civ. Pro., § 652.

³ Code Civ. Pro., § 653.

stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and must, within five days after the levy, be filed in the office of the clerk of the county, where the property is attached.¹

To Maintain Actions, etc.—The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects and things in action, attached by him. He may maintain any action or special proceeding in his own name, or in the name of the defendant, which is necessary for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding, at such time and on such terms as the court or judge directs.²

An indebtedness due upon account from a third person to the principal defendant, cannot be reached on attachment by seizure and sale of the books of account, etc., but only by a suit by the sheriff to collect the debt and apply the proceeds to the plaintiff's demand.³

As to Perishable Goods.—If property attached, other than a vessel, is perishable, the court or judge may, by an order made with or without notice, as the urgency of the case in its or his opinion requires, direct the sheriff to sell it at public auction, and thereupon the sheriff must sell it accordingly. If it consists of live animals, the same proceedings may be had, but such notice shall be given to the parties to the action, of the application for the order as the court or judge prescribes. The order directing the sale must prescribe the time and place of the sale, and notice thereof must be given in such manner, and for such time as is prescribed in the order. The sheriff must retain in his hands the proceeds of the sale, after deducting his expenses as allowed by the court or judge.⁴

¹ Code Civ. Pro., § 654.

² Code Civ. Pro., § 655; *Andrews v. Glenville Woolen Co.*, 11 Abb. Pr. (N. S.), 78.

³ *Clark v. Warren*, 7 Lans., 180.

⁴ Code Civ. Pro., § 656; *Pollard v. Baker*, 101 Mass., 259.

A statutory authority to sell "perishable goods" which have been seized on an attachment, should be limited to such goods as are liable to perish before the time arrives at which they might be sold in the regular course of proceedings.¹ It should appear that the property is inherently liable to deterioration and decay; it is not sufficient to show that it will depreciate in value because of changes in the styles and fashions.² But by consent of all the parties the sheriff may sell any property attached and hold the proceeds, as the property itself. In the sale of attached goods, neither the court nor the parties can *compel* the sheriff to employ an auctioneer. The sheriff has the sole right to direct and control the sale. He may employ an auctioneer whose legal fees, *and no more*, are a proper item to be allowed, as disbursements upon the attachment proceedings. The sheriff remains responsible for the proceeds, although by consent of the parties, the court appoints an auctioneer to sell. He has no more right to permit the proceeds to go into the hands of such auctioneer, than into the hands of any other agent he might employ about the sale.³

Claim of Property, How Tried.—If goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, the sheriff may, in his discretion, empanel a jury to try the validity of the claim.⁴

Proceedings if Claimant Succeeds.—If, by their inquiry, the jury find the property of the goods or effects to have been in the claimant at the time of the levy, the sheriff must forthwith deliver them to him or his agent; unless the plaintiff gives an undertaking, with sufficient sureties, to indemnify the sheriff for the detention thereof. If the undertaking is given, the sheriff must detain the goods or effects, as the property of the defendant.⁵

If the property is found to be in the defendant, the finding

¹Henisler v. Friedman, 5 Penn. L. J., 147; Oneida Nat. Bank v. Puldi, 2 Mich. (N. P.), 221.

²Fisk v. Spring, 25 Hun, 367.

³Griffin v. Helmbold, 72 N. Y., 437.

⁴Code Civ. Pro., § 657.

⁵Code Civ. Pro., § 658.

does not prejudice the right of the claimant to bring an action, to recover the goods or effects, or the value thereof.¹

On Claim to Domestic Vessel.—Where a vessel, belonging to a port or place in the United States, or a share or interest therein, is attached, the court or judge, on the application, within thirty days thereafter, of a person claiming title thereto, or of his agent, must appoint three indifferent persons to make a valuation thereof.²

Appraisers, How Sworn.—A valuation of a vessel, or of a share or interest therein, made as prescribed, must be in writing, and subscribed by the appraisers; each of whom must take and subscribe an affidavit annexed thereto, to the effect that the valuation is, in all respects, just and fair, and that the value of the vessel, share or interest, is truly stated therein, according to the deponent's belief. The valuation must be immediately returned to the court or judge; and, after an undertaking is given, or after the expiration of the time to give an undertaking, as prescribed in the next subdivision, it must be delivered to the sheriff.³

Undertaking.—Within two days after the valuation is returned, the claimant or his agent may execute an undertaking to the sheriff, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that, in an action to be brought on the undertaking, the claimant will establish that he was the owner of the vessel, share or interest, at the time of the levy thereupon; and that in case of his failure to do so, he will pay the amount of the valuation, with interest from the date of the undertaking, to the sheriff; or, if the warrant is vacated or annulled, to the defendant or his personal representative.⁴

Vessel, When Discharged.—Upon such an undertaking being executed and delivered to the sheriff, the court or judge must make an order, directing the vessel or share to be discharged from the attachment. Thereupon the sheriff must discharge the same accordingly.⁵

¹ Code Civ. Pro., § 659.

² Code Civ. Pro., § 660; *Haeberle v. Barringer*, 29 La. Ann., 410; *Merritt v. Peabody*, 40 Ga., 178.

³ Code Civ. Pro., § 661.

⁴ Code Civ. Pro., § 662.

⁵ Code Civ. Pro., § 663.

Undertaking, when Sued.—The court or judge may, upon the application of either party, at any time before the warrant is vacated or annulled, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions, and under such regulations, between him and the applicant, as it or he deems just. And if the warrant of attachment is vacated or annulled, the defendant in the attachment, his assignee or personal representative, may commence and maintain an action upon the undertaking, or may be substituted, in place of the sheriff, in an action pending thereupon.¹

Defense in Action Upon.—In such an action, the claimant may show, in bar of a recovery, that he was the owner of the vessel, share, or interest, at the time when it was attached. If judgment passes against him, the plaintiff is entitled to recover the amount of the valuation, with interest from the date of the undertaking.²

Foreign Vessel, how Valued.—Where a foreign vessel, or a share or interest therein, is attached, it must be valued, as prescribed in sections 660 and 661 of the Code, upon the application of a person, who makes affidavit, to the effect that he is the owner thereof, or that he is the agent of a person, naming him and his residence, whom he believes to be the owner of the vessel, share, or interest attached.³

Notice Thereof.—Notice of the application must be given to the plaintiff, as the court or judge deems reasonable.⁴

Plaintiff to give Bond.—Within three days after the valuation is returned, the plaintiff must give, to the person in whose behalf the claim is made, an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will pay such damages as may be recovered for seizing the vessel, share, or interest, in an action brought against the sheriff, or the plaintiff in the attachment, within three months from the approval of the undertaking, if it appears therein that the vessel, share, or interest belonged, at the time of attaching it, to the person in whose behalf the claim is made.⁵

¹ Code Civ. Pro., § 664.

⁴ Code Civ. Pro., § 667.

² Code Civ. Pro., § 665.

⁵ Code Civ. Pro., § 668.

³ Code Civ. Pro., § 666.

Vessel, when Discharged.—Unless such an undertaking is given, the court or judge must grant an order discharging the vessel, share or interest so claimed, from the attachment; whereupon the sheriff must discharge the same accordingly.¹

When Debtor may Claim.—If, after such an undertaking is given by the plaintiff, the warrant is vacated or annulled, or the attachment is discharged as to the vessel, share, or interest, the defendant or his agent is entitled to claim the same, or the proceeds thereof, if it has been sold, only upon his showing, to the satisfaction of the court or judge, that the undertaking has been discharged; or giving to the plaintiff an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will indemnify the plaintiff against all charges and expenses, in consequence of the undertaking.²

Vessel, when Sold.—If the undertaking of the plaintiff is not discharged, or he is not indemnified, as above prescribed, within one month after the defendant becomes entitled to claim the vessel, share, or interest, as so prescribed, it may be sold by the sheriff, in whose custody it is, upon an order of the court or judge; and the proceeds of the sale must be paid to the persons who executed the undertaking, for their indemnity.³

If a claim is not made, by or in behalf of an owner of a domestic vessel, or of a share or interest therein, within thirty days after it is attached, or if the proper undertaking is not executed by the claimant; or if a claim is not made, within that time, by or in behalf of the owner of a foreign vessel, or of a share or interest therein; the vessel, share or interest, may be sold by the sheriff, under an order of the court or judge, upon the application of the plaintiff, if, in the opinion of the court or judge, a sale is necessary.⁴

Where a share or interest in a vessel, foreign or domestic, is attached, if the proper claim to it is not made, by or in behalf of an owner thereof, within thirty days thereafter, it may be sold by the sheriff, under an order of the court

¹ Code Civ. Pro., § 669.

² Code Civ. Pro., § 670.

³ Code Civ. Pro., § 671.

⁴ Code Civ. Pro., § 672.

or judge, upon the application of a joint owner, or his agent.¹

Sheriff to Keep Property Attached.—The sheriff must keep the property attached by him, or the proceeds of property sold, or of a demand collected by him, to answer any judgment that may be obtained against the defendant in the action.²

Where personal property is attached by an officer, it is his duty, as soon as may be, to remove the property from the possession of the debtor and into his own immediate possession. The permanent stationing of a keeper over the property is not warranted by law, and a charge therefor cannot legally be included in the taxable costs of the action.³ If he delay unreasonably to take them into his possession, he becomes a trespasser thereby.⁴

Where property has been duly attached, it is held to meet the ultimate recovery in the action, and the attachment cannot be discharged upon an offer to pay the amount of the judgment first found, from which judgment the plaintiff has duly appealed.⁵

Sheriff, when to pay Money into Court.—The court, upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of a demand collected, or property sold; or to deposit them in a designated bank or trust company, to be drawn out only upon the order of the court.⁶

When to Release or Deliver Property.—Where the proceeds of the property sold, and of the demands collected by the sheriff, exceed the amount of the plaintiff's demand, with the costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands, chargeable upon the same; the court, or the judge who granted the

¹ Code Civ. Pro., § 673.

² Code Civ. Pro., § 674.

³ *Cutter v. Howe*, 122 Mass., 541; *Scott v. Davis*, 26 La. Ann., 688; *Newman v. Kane*, 9 Nev., 234.

⁴ *Davis v. Stone*, 120 Mass., 228; *Williams v. Powell*, 101 id., 467.

⁵ *Wright v. Rowland*, 4 Abb. Ct. App., 649; S. C., 4 Keyes, 165; 36 How. Pr., 248.

⁶ Code Civ. Pro., § 675.

warrant, upon the application of the defendant, or of an assignee of, or purchaser from the defendant, and upon notice to the plaintiff, and the plaintiffs in the other warrants or executions, may, at any time during the pendency of the action, make an order, directing the sheriff to pay over the surplus to the applicant, and to release from the attachment the remaining real and personal property attached.¹

When Action by Plaintiff.—The plaintiff by leave of the court or judge, procured as prescribed in the next subdivision, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of the Code, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as therein prescribed, by a person other than the plaintiff. The sheriff must receive the proceeds of such an action, but he is not liable for the costs or expenses thereof. Costs may be awarded in such an action against the plaintiff in the warrant, but not against the sheriff.²

Leave For, How Procured.—The court or judge must grant leave to bring such an action, where it appears that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff, in any other warrant against the same defendant. And such terms, conditions and regulations may be imposed in the order granting leave, as the court or judge thinks proper, for the due protection of the rights and interests of all persons interested in the disposition of the proceeds of the action.³

Joined With Sheriff After Action Commenced.—Leave may in like manner and with like effect, be granted to the plaintiff in the warrant, to be joined with the sheriff, in an action brought by the sheriff, in a case where he might have procured leave to bring the action, as prescribed in sections 677 and 678 of the Code. Upon an application therefor, the

¹ Code Civ. Pro., § 676.

³ Code Civ. Pro., § 678.

² Code Civ. Pro., § 677.

court or judge may, in a proper case, require the plaintiff to provide for the expenses in the action, already incurred by the sheriff. The application must be denied in case of an unreasonable delay in making it; or where an application was made before the action was brought, and the plaintiff neglected or refused, without a good excuse therefor, to comply with the terms, conditions or regulations then imposed.¹

Judge to Direct Management of Action.—The court or judge may, upon the application of the sheriff, or of the defendant in the warrant, during the pendency of the action, brought as prescribed in the last three sections of the Code cited, direct as to the conduct, discontinuance or settlement of the same, and as to the application or disposition of the money or property recovered therein, as justice requires.²

Return of Inventory.—Upon the application of either party, and proof of the neglect of the sheriff, the court or judge may, by order, require the sheriff to return an inventory. Disobedience to such an order may be punished as a contempt of the court.³

Sheriff's Return on.—The return of the sheriff should show that the property was levied upon as belonging to the defendant.⁴ And in attaching property incapable of manual delivery, and in possession of a corporation or an association, it should show affirmatively with whom the copy of the warrant and the requisite notice had been left, so that the court can determine whether the company has been duly apprised of the proceedings.⁵ Perhaps in our State, as in New Jersey,⁶ the sheriff's certificate that he has duly executed the warrant, accompanied by an inventory and appraisement as the Code directs, would constitute a sufficient return unless the warrant were vacated or annulled. The better practice is, how-

¹ Code Civ. Pro., § 679.

² Code Civ. Pro., § 680.

³ Code Civ. Pro., § 681.

⁴ Code Civ. Pro., § 654; *Sharp v. Baird*, 43 Cal., 577; *Foster v. Illinski*, 3 Ill. App., 345; *Norvell v. Porter*, 62 Mo., 309; *Sanford v. Pond*, 37 Conn., 588.

⁵ *No. Cent. R. Co. v. Rider*, 45 Md., 24; see *Leonard v. Woodward*, 34 Mich., 514; *Liblong v. Kansas F. Ins. Co.*, 82 Penn. St., 413; *Folsom v. Conner*, 49 Vt., 4; *Ezelle v. Simpson*, 42 Miss., 515.

⁶ *Boyd v. King*, 36 N. J. L., 21.

ever, to show by a return, all and particular the proceedings had upon and under the warrant. The return, after it is filed, may be amended in a proper case, on the application of the officer making it.¹ A return is also open to contradiction.²

3. *Vacating or Modifying the Warrant.*

Motion for, When and by Whom Made.—The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative.³

Motion, How Made and Opposed.—An application specified in the last cited section, may be founded only upon the papers upon which the warrant was granted; in which case it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice as he deems proper. Or it may be founded upon proof by affidavit, on the part of the defendant; in which case it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.⁴

The denial of such an application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint which had not been filed or served at the time of the former application, to set forth any of the

¹ Odom v. Shackelford, 44 Ala., 331; Sanford v. Pond., 37 Conn., 588.

² Buckingham v. Osborne, 44 Conn., 133.

³ Code Civ. Pro., § 682; Dusseldorf v. Redlich, 16 Hun, 624.

⁴ Code Civ. Pro., § 683; Ives v. Holden, 14 Hun, 402; Steuben Co. Bank v. Alberger, 55 How. Pr., 481.

causes of action mentioned in sections 635 and 637 of the Code of Civil Procedure.¹

Discharge.—The defendant may, at any time after he has appeared in the action, and before final judgment, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached.²

Undertaking to be Given.—Upon such an application, a sole defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion.³

Application by one of several Defendants.—Where there are two or more defendants, and an application is made, as prescribed in the last two sections cited, by one or more, but not by all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof, by affidavit, to the satisfaction of the court or judge, that the property, with respect to which the application is made, belongs to him separately; in which case, the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant, either alone, or jointly with any other defendant. Where such an application is made, at least two days notice thereof, with a copy of the affidavit, must be served upon the plaintiff's attorney, who may oppose the application by proof, by affidavit, that one or more of the other defendants own, or have an interest in the property.⁴

¹ Code Civ. Pro., § 686.

² Code Civ. Pro., § 687.

³ Code Civ. Pro., § 688; *Dusseldorf v. Redlich*, 16 Hún, 624.

⁴ Code Civ. Pro., § 689.

Sureties to Justify.—An undertaking, given as prescribed in the last two sections cited, must be forthwith filed with the clerk. A copy thereof, with a notice of the filing, must be forthwith served upon the plaintiff's attorney; who may, within three days thereafter, give notice to the sheriff, that he excepts to the sufficiency of the sureties. Thereupon the sureties must justify, upon the like notice, and in like manner, as bail upon an arrest; or a new undertaking must be given, with new sureties, who must justify in like manner. If the plaintiff does not except, as prescribed in this section, he is deemed to have waived all objection to the sureties.¹

Sheriff to Retain Property.—The sheriff is responsible for the sufficiency of the sureties; and he may retain possession of the property attached, and the proceeds thereof, until the objection to them is waived, as prescribed in the last section, or they, or the new sureties, justify.²

As to Vessels.—Stay of Proceedings, etc.—The last five sections are applicable where a vessel, or a share or interest therein, is attached. If it is necessary, to enable the defendant to discharge the attachment, the court or judge may, by order, stay any proceeding specified in article second of this title, or extend the time to do any act therein specified.³

Partners, when may Apply for Discharge.—If a warrant of attachment is levied upon the interest of one or more partners, in goods or chattels of a partnership, the other partners, who are not defendants in the action, or any of them, may, at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.⁴

The right of the sheriff to levy upon and sell the interest of a partner in partnership property, under an attachment or execution against such partner for his individual debt, is undoubted. For the purpose of rendering such levy and sale effectual, it is also well settled that the sheriff may take possession of the whole property, and, upon a sale, may de-

¹ Code Civ. Pro., § 690.

² Code Civ. Pro., § 691.

³ Code Civ. Pro., § 692.

⁴ Code Civ. Pro., § 693.

liver it to the purchaser, who takes it subject to the rights of the copartners of the debtor and the creditors of the firm, and subject to an accounting which may disclose that he derived no beneficial interest from his purchase. All that he can ultimately obtain is the debtor's share of such surplus as may remain after payment of the firm debts, and the adjustment of the account of the partners as between themselves. The proceedings of the sheriff to reach this interest, should be conducted, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the corpus of the property, is merely incidental to the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, and dispose of it as, when instead of selling the interest of the debtor partner, he undertakes to sell the entire property, although his act is nugatory, such interference renders him liable as a trespasser, *ab initio*.¹

By section 693 of the Code of Civil Procedure, however, a way is provided by which the partners, other than the debtor partner, may retain control of the partnership property. Upon the application provided by that section, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, the amount of any judgment, which may be recovered against the partner who is defendant in the action; or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a warrant of attachment, or an execution, may come to the sheriff's hands, at any time before the warrant of attachment, which was so levied, is vacated or annulled; not exceeding a sum, specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or chattels seized, by virtue of the attachment, as fixed by the court or judge. If the value,

¹ *Atkins v. Saxton*, 77 N. Y., 195; *Waddell v. Cook*, 2 Hill, 47.

in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.¹

For the purpose of fixing the sum, or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference.²

The court or judge may direct that the plaintiff have notice of an application for a discharge of property, or of the hearing under an order of reference, made as prescribed in the last section of the Code cited; and if the applicant does not appear, where notice has been given, the application may be denied.³

Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections 693 and 694 of the Code, a levy, by virtue of an execution against his individual property, cannot be made upon his interest in the same property, unless the warrant of attachment has been vacated or annulled.⁴

4. Regulations When There are Two or More Warrants Against the Same Defendant.

Preferences of Two or More Warrants.—Where two or more warrants of attachment, against the same defendant, are delivered to the sheriff of the same county, to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior warrant, are the same, as where two or more executions, against the property of the same defendant, are delivered to the sheriff of the same county, to be executed.⁵

Rule as to Levy Under Junior Warrant.—Where a domestic vessel, or a share or interest therein, has been attached, and afterwards released; or where the personal property of a partnership, of which the defendant was a member, has been attached, and the attachment afterwards discharged, upon the application of another partner; another warrant, against the same defendant, shall not be levied on

¹ Code Civ. Pro., § 694.

² Code Civ. Pro., § 695.

³ Code Civ. Pro., § 696.

⁴ Code Civ. Pro., § 1415.

⁵ Code Civ. Pro., § 697.

the same property, by the sheriff of the same or of any other county, until after the first warrant has been vacated or annulled. But, except as thus prescribed, where a second warrant, against the same defendant, is delivered to the same sheriff, he must execute it, by a levy upon property within his county, and he must thereupon take the same proceedings, as if the levy was made under the first warrant.¹

Undertaking by Junior Attaching Creditor.—Where a foreign vessel, or a share or interest therein, has been attached, and valued as prescribed in article two, title three of the Code of Civil Procedure, and the plaintiff, in the first warrant of attachment, fails to give an undertaking to prevent the release thereof, the court or judge may grant to the plaintiff in a second warrant, then in the sheriff's hands for execution, an extension of not more than three days thereafter, within which to furnish an undertaking, in all respects, like the one to be furnished by the first plaintiff. And if he furnishes it, within that time, he has the same rights and privileges, and is subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if his was the first warrant.²

As to Subsequent Attachment.—If a foreign vessel, or a share or interest therein, has been attached, and afterwards released, by reason of the failure of the plaintiff, in the first or the second warrant, to give an undertaking to prevent the release, it shall not be again attached, under a warrant against the same defendant, which had been delivered to the sheriff of the same county, before the expiration of the time within which the undertaking should have been furnished. But it may be again attached, under a subsequent warrant against the same defendant; in which case the plaintiff therein, and the plaintiff in each warrant subsequently delivered to the sheriff, have the same rights and privileges, and are subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if the warrant, under which it was attached, was the first warrant.³

¹ Code Civ. Pro., § 698.

³ Code Civ. Pro., § 702.

² Code Civ. Pro., § 701.

When Allowed to Commence Action.—A plaintiff in a second warrant may apply to the court or judge, upon notice to the plaintiff in the first warrant, and to the sheriff, for leave to bring and maintain, in the name of himself and the sheriff jointly, any action, which might be brought in the name of the senior plaintiff and the sheriff. If it appears that the plaintiff in the first warrant neglects or refuses to be joined with the sheriff in such an action, or to comply with the terms, conditions and regulations imposed, either upon granting him an order for that purpose, or upon the hearing of an application, made as prescribed in this section, the court or judge may grant to the plaintiff in the second warrant, leave to bring and maintain such an action, in the name of himself and the sheriff jointly, with like effect as if his was the first warrant.¹

Rights of Other Attaching Creditors.—Where there are more than two warrants of attachment, against the same defendant, the plaintiffs in the third and each subsequent warrant have, according to their respective priorities, the same rights and privileges, as against the plaintiffs in all senior warrants, which the plaintiff in the second warrant has, as against the plaintiff in the first, and are subject to the same duties and liabilities; except that a second extension of the time, within which to furnish an undertaking to prevent the release of a foreign vessel, or a share or interest therein, shall not be granted. And the plaintiffs in two or more junior warrants of attachment, may, by agreement among themselves, take jointly, and for their common benefit, any proceeding, permitted by this title to be taken, by the plaintiff in a second or subsequent warrant of attachment; provided that it does not interfere with the preferential or other right of an intermediate plaintiff.²

Rights of Junior Plaintiff.—Where the plaintiff in a warrant of attachment has commenced an action, in the name of himself and the sheriff jointly, a plaintiff in a junior warrant may apply to the court or judge, to direct as to the conduct, discontinuance or settlement of the same, or to impose terms, conditions and regulations as to the continuance thereof, in the interest of

¹ Code Civ. Pro., § 704.

² Code Civ. Pro., § 705.

the applicant; and such order may be made thereupon, as justice requires. If the first warrant is vacated, or the attachment thereunder is released or discharged, without affecting the cause of action prosecuted by the plaintiff therein and the sheriff jointly, the plaintiff in the warrant next in order, may, upon his own application, be substituted as joint plaintiff with the sheriff, by an order, made as upon an application for leave to bring such an action.¹

5. *Proceedings After Judgment; Rights of Parties, and Duties of the Sheriff, After the Warrant is Vacated or Annulled, or the Attachment Discharged.*

Execution, to Whom Issued.—Where a levy, under a warrant of attachment in an action, has been made, an execution against the property, upon a final judgment in favor of the plaintiff therein, recovered after the expiration of the term of office of the sheriff, who made the levy, must nevertheless be directed to and executed by that sheriff, unless another person is designated by law to complete the unfinished business pertaining to his office; or, in that case, to the person so designated.²

Judgment, How Enforceable.—Where the defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in the Code of Civil Procedure, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered.³

Judgment, How Satisfied.—Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached

¹ Code Civ. Pro., § 703.

² Code Civ. Pro., § 706.

³ Code Civ. Pro., § 707; but this section does not declare the effect of such a judgment as is described in the section, with respect to the application of any statute of limitation; *Clymore v. Williams*, 77 Ill., 618; *Gass v. Williams*, 46 Ind., 253; *Parsons v. Paine*, 26 Ark., 124; *Banta v. Wood*, 32 Iowa 469; *Massey v. Scott*, 49 Mo., 378; *Autry v. Walters*, 46 Ala., 476.

by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him ; or so much thereof as is necessary to satisfy the judgment.

2. If any balance remains due, he must sell, under the execution, the other personal property attached, or so much thereof as is necessary ; including rights or shares in the stock of an association or corporation, or a bond or other instrument for the payment of money, executed and issued, with the interest coupons annexed, if any, by a government, State, county, public officer, or municipal or other corporation, which is in terms negotiable, or payable to the bearer or holder, the principal whereof is not then payable ; but not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires him to satisfy it out of any other personal property of the defendant, he must sell the personal property, upon which he has levied by virtue of the execution. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title and interest, which the defendant had in the real property attached, at the time when the notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff, without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof ; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person, who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court, upon the petition of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used diligence in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected; may direct the sheriff to sell the remaining portion, upon such terms, and in such manner, as he thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served upon the defendant, and he did not appear, the court may make such order as to service of notice as it thinks proper, or may grant the application without notice.¹

When Property Restored to Defendant.—Where a warrant of attachment is vacated or annulled, or an attachment is discharged, upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges and expenses, legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged, or the proceeds thereof, if it has been sold by him.²

Where the sheriff is required, to deliver attached property, or the proceeds thereof, to the defendant, he must also deliver to him, unless otherwise specially directed by the court or judge, all books of account, vouchers, evidences of debt, muniments of title, or other papers, relating to the property, either real or personal, or to its proceeds; together with all undertakings, relating thereto, which he has taken in the course of the proceedings, and which have not been fully satisfied; except an undertaking, given by the defendant, upon the discharge of property. He must also deliver a written assignment, duly

¹ Code Civ. Pro., § 708; *Jones v. Hart*, 60 Mo., 351; *Schenck v. Griffin*, 38 N. J. L., 462.

² Code Civ. Pro., § 709; *Jackman v. Anderson*, 33 Ark., 414.

acknowledged, of each undertaking so delivered, and of each other instrument, to which the defendant is thus entitled, an assignment of which is necessary to perfect or protect the defendant's title thereto. The defendant must also, but upon his own application only, be substituted in place of the sheriff, or the sheriff and the plaintiff jointly, in an action thus brought; but the court or judge may impose, as a condition of granting the order of substitution, such terms as justice requires, with respect to indemnity and payment of expenses. The defendant's rights, with respect to property attached and not disposed of, and an undertaking, or other instrument, to which he is thus entitled, are the same as those of the sheriff, while the warrant was still in force, except where his rights are specially defined or regulated by law.¹

Cancelling Notice Attaching Real Property.—At any time after the warrant of attachment has been vacated or annulled, or the attachment has been discharged as to real property attached, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as it deems just, direct, that any notice, filed for the purpose of attaching the property, be cancelled of record, by the clerk of the county where it is filed and recorded. The cancellation must be made by a note, to that effect, on the margin of the record, referring to the order; and, unless the order is entered in the same clerk's office, a certified copy thereof must, at the same time, be filed therein.²

When Sheriff to Return Warrant, etc.—Where a warrant of attachment has been vacated or annulled, the sheriff must forthwith file, in the clerk's office, the warrant, with a return of his proceedings thereon. Upon the application of either party, and proof of the sheriff's neglect, the court may direct him so to do, forthwith, or within a specified time.³

As to the fees and compensation of sheriffs on attachment proceedings, see *post*, chapter seven.

¹ Code Civ. Pro., § 710.

² Code Civ. Pro., § 711.

³ Code Civ. Pro., § 712.

6. *Miscellaneous Provisions.*

Warrant to Seize Chattel in an Action to Foreclose a Lien Thereon.—Where the action is brought in the Supreme Court, a Superior City Court, the Marine Court of the City of New York, or a County Court, if the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff to seize the chattel, and safely keep it, to abide the final judgment in the action. The provisions of title three of chapter seven of the Code of Civil Procedure (the provisions treated of in this section) apply to such warrant, and to the proceedings to procure it, and after it has been issued, as if it was a warrant of attachment,¹ except that this provision does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action; nor does it apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.²

Judgment.—In such an action brought in one of the courts above specified, final judgment, in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same, and costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, until it is claimed by him. If a defendant, upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.³

Action in Inferior Court.—Where the action is brought in a court, other than one of those above, and in section 1738 of the Code of Civil Procedure specified, if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel, and safely keep it to abide the judgment, may be issued, in like manner as

¹ Code Civ. Pro., § 1738.

³ Code Civ. Pro., § 1739.

² Code Civ. Pro., § 1741.

a warrant of attachment may be issued in an action founded upon a contract, brought in the same court; and the provisions of law, applicable to a warrant of attachment issued out of that court, apply to a warrant, so issued as herein prescribed, and to the proceedings to procure it, and after it has been issued; except as otherwise specified in the judgment. A judgment in favor of the plaintiff, in such an action, must correspond to a judgment, rendered as prescribed in section 1739 of the Code, except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed; and the payment of the surplus, if its safe-keeping is necessary, to the county treasurer, for the benefit of the owner.¹

When Proof of the Levy of Attachment Required.—A judgment shall not be rendered for a sum of money only, upon an application made pursuant to section 1216 of the Code of Civil Procedure, except in an action specified in section 635 thereof. Where the defendant is a non-resident or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

1. Proof, by affidavit, that a warrant of attachment, granted in the action, has been levied upon property of the defendant.

2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof, according to the inventory.

3. An undertaking, executed by at least two sureties, in a sum fixed by the court, to the effect, that the plaintiff will abide the directions of the court, touching the restitution of any money, collected under or by virtue of the judgment, if the defendant, or his representative, applies and is admitted to defend the action, and succeeds in his defense.²

A warrant of attachment cannot be granted in an action, which becomes such by the submission of a controversy, upon facts admitted.³

A levy made under a warrant of attachment, will not be

¹ Code Civ. Pro., § 1740.

² Code Civ. Pro., §§ 1216, 1217.

³ Code Civ. Pro., § 1281.

discharged by an appeal in the action wherein it is issued, no matter what security is given.¹

A warrant of attachment is said to be "annulled," when the action in which it was granted abates or is discontinued; or a final judgment, rendered therein in favor of the plaintiff, is fully paid; or a final judgment is rendered therein, in favor of the defendant. But, in the case last specified, a stay of the proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant.²

SECTION IV.

DUTIES OF SHERIFF IN AN ACTION FOR A CHATTEL.

1. *Replevin Process, How Obtained.*

When Replevin Precedes Summons.—Where a chattel is replevied before the service of the summons, as prescribed in article one, title two, chapter fourteen of the Code of Civil Procedure, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisioned remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action, and as equivalent to the commencement of the action, for the purpose of determining whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto.³

Sheriff Required to Replevy.—The plaintiff may, when the summons is issued, or at any time afterwards, and before the service of a copy of the defendant's answer; or, where judgment is taken by default for want of an appearance or pleading, before the entry of the final judgment, cause the chattel, to recover which the action is brought, to be replevied by the sheriff of the county where it is found. For that purpose, he must deliver to the sheriff an affidavit, and a written undertaking (as hereinafter shown); with a written requisition, indorsed upon or annexed to the affidavit, and subscribed by his attorney, to the effect, that

¹ Code Civ. Pro., § 1311.

³ Code Civ. Pro., § 1693.

² Code Civ. Pro., § 3343, subd. 12.

the sheriff is required to replevy the chattel described therein. The requisition may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. It is deemed the mandate of the court.¹

Affidavit Therefor.—The affidavit, to be delivered to the sheriff must particularly describe the chattel to be replevied, and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful by reason of defects in the process, or other causes specified, or that the detention is unlawful by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure, or, if it has been so seized, that it was exempt from the seizure by reason of facts specified, or that its detention is unlawful by reason of facts specified, which have subsequently occurred.

6. Its actual value.² But where the affidavit is made after the service of the summons, the allegations, required to be inserted therein by subdivisions first and second of section 1695, must be to the effect that the plaintiff, at the time of the commencement of the action, was the owner of the

¹ Code Civ. Pro., § 1694; see *People v. Core*, 85 Ill., 248; *Bugle v. Myers*, 59 Ind., 73.

² Code Civ. Pro., § 1695.

chattel, or was entitled to the possession thereof by virtue of a special property therein, and that it was then wrongfully detained by the defendant, as prescribed in those subdivisions.¹

Affidavit, where Several Chattels are to be Replevied.—Where the affidavit describes two or more chattels of the same kind, it must state the number thereof; and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as hereinafter stated, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must, with few exceptions hereafter shown, be delivered to the plaintiff.²

Where Part Only is Replevied.—The sheriff must replevy a smaller number, or a smaller quantity, if the whole of the chattel or chattels described in the affidavit cannot be found. In that case, if the aggregate value only is stated in the affidavit, the value of the entire chattel or class of chattels, as so stated, is to be deemed the value of the part replevied, for the purpose of the proceedings, to procure a return thereof to the defendant.³

The Undertaking.—The undertaking to be delivered to the sheriff, with a requisition to replevy a chattel, must be executed, by at least two sureties, who must be approved by the sheriff. It must be to the effect that the sureties are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action; for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendant, and for the payment to the defendant of

¹ Code Civ. Pro., § 1696.

² Code Civ. Pro., § 1698.

³ Code Civ. Pro., § 1697.

any sum which the judgment awards to him against the plaintiff.¹

2. *Chattel, how Replevied and Kept.*

How Replevied.—If any chattel, described in the affidavit, is found in the possession of the defendant, or of his agent, the sheriff, to whom an affidavit, requisition and undertaking are delivered, as prescribed in the section of the Code heretofore cited, must forthwith replevy it, by taking it into his possession. He must thereupon, without delay, serve on the defendant a copy of the affidavit, requisition and undertaking, by delivering the same to him personally, if he can be found within the county; or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or, if neither can be found within the county, by leaving the copy at the usual place of abode of either, with a person of suitable age and discretion.² If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it is not delivered pursuant to the demand, he must cause the building or inclosure to be broken open, and he must take the chattel into his possession.³ Process, in an action for a chattel, only goes against the person in possession by himself or agent, and in such action the sheriff can only take property from the possession of the defendant or his agent.⁴ If the defendant has procured the redelivery of the property to him by giving the statutory undertaking, he is estopped to deny that he had possession when the action was commenced.⁵

How Kept.—A sheriff who has replevied a chattel, must retain it in his possession, keeping it in a secure place, until the person, who is entitled to the possession thereof, is ascertained as the Code prescribes. He must then deliver it to that person, upon request and payment of his lawful fees, and necessary expenses for taking and keeping it, as taxed by a judge of the court, or the county judge of the

¹ Code Civ. Pro., § 1699.

² Code Civ. Pro., § 1700.

³ Code Civ. Pro., § 1701.

⁴ *Hess v. Sprague*, 13 Week. Dig., 164; *Dowell v. Taylor*, 2 Mo. App., 329.

⁵ *Diossy v. Morgan*, 74 N. Y., 11.

county where the chattel was replevied, upon such a notice as the judge deems proper.¹

When Defendant May Except to Sureties.—Within three days after the chattel is replevied, and a copy of the affidavit, requisition and undertaking is served, the defendant, unless he requires a return of the chattel replevied, or of one or more of them, where two or more chattels are replevied, may serve upon the sheriff a notice, that he excepts to the plaintiff's sureties, otherwise he is deemed to have waived all objections to them. Where the defendant has not appeared, the notice must be subscribed either by him, or by his agent or attorney. The person so subscribing the notice must add to his signature his office address as prescribed by law, with respect to a notice of appearance. Within ten days after service of such a notice, the plaintiff's attorney must serve upon the defendant's attorney, or, if the defendant has not appeared, upon the sheriff, notice of the justification of the sureties. If the notice of justification is served upon the sheriff, he must immediately serve it upon the person whose name is subscribed to the notice of exception, in the mode prescribed by law, for service of a paper upon an attorney in an action.²

When Defendant May Reclaim Chattel.—The defendant, if he does not except to the plaintiff's sureties, as prescribed in section 703 of the Code, may, within the time allowed to him for such an exception, serve upon the sheriff, a notice that he requires a return of the chattel replevied. With the notice, he must deliver to the sheriff the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if

¹ Code Civ. Pro., § 1702.

² Code Civ. Pro., § 1703; and see §§ 796 to 798.

delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum, which the judgment awards against the defendant.

Within three days after serving a notice, requiring a return of the chattel, the defendant must serve upon the plaintiff's attorney, notice of the justification of the sureties to the undertaking.¹

Sureties, When and How to Justify.—The justification of sureties, as prescribed in either section 1704 or 1703, of the Code, must take place, either in the county where the chattel was replevied, or in the county where one of the sureties resides. The provisions, regulating the justification of bail, contained in article three of title one of chap. seven of the Code (*ante*, p. 272, 240), govern, except as otherwise expressly prescribed in chap. fourteen, title two, article one of the Code, with respect to the notice of justification of the sureties; the officer before whom they must justify; the substitution of new sureties or a new undertaking; the examination and qualification of the sureties; and the allowance of the undertaking. But after the allowance, the undertaking and examination must be delivered to the sheriff.²

Sheriff to Deliver Chattel to Whom.—If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose; or if he makes default in serving notice of the justification of his sureties, or in procuring the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking; the sheriff must, except in the case specified in section 1709 of the Code, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, makes default in serving notice of justification, or in procuring the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, duly procures the allowance of his undertaking; the sheriff must immediately deliver the chattel to the defendant. When the chattel is delivered by the sheriff to either party, as prescribed in section 1706 of the Code, the

¹ Code Civ. Pro., § 1704.

² Code Civ. Pro., § 1705.

sheriff ceases to be responsible for the sufficiency of the sureties of either party; until then, he is responsible for the sufficiency of the sureties of the plaintiff, or of the defendant, as the case may be.¹ Under sections 1704 and 1706 of the Code, where the defendant desires to reclaim chattels replevied, he must serve upon the sheriff, written notice that he requires the return thereof; and he must file an affidavit that he is the owner of the property, or that he is lawfully entitled to the possession thereof. These conditions are mandatory, and the failure of a defendant to comply with them, renders his counter bond nugatory.²

Penalty for Wrong Delivery by Sheriff.—A sheriff, who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in section 1706 of the Code, or by virtue of an execution issued upon a judgment in the action, forfeits, to the party aggrieved, \$250; and is also liable to him for all damages which he sustains thereby.³ Where the sheriff duly delivers a chattel to either party, as prescribed in said section 1706, he must, at the same time, deliver to the adverse party the undertaking received by him from the party to whom the chattel is delivered, together with the examination of the sureties, and the judge's allowance, if any.⁴

Proceedings on Claim of Property by Third Person.—At any time before a chattel, which has been replevied, is actually delivered to either party, if a person, not a party to the action, claims, as against the defendant, a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the sheriff, in his behalf, stating that he makes such a claim, specifying the chattel or chattels to which it relates—if two or more chattels have been replevied—and the claim relates only to part of them, and setting forth the facts upon which his right of possession depends. In that case the sheriff may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney a copy of the affidavit, with a notice that he requires indemnity against

¹ Code Civ. Pro., § 1706.

² *Teschner v. Deveron*, 59 How. Pr., 467.

³ Code Civ. Pro., § 1707.

⁴ Code Civ. Pro., § 1708.

the claim. If the indemnity is not furnished, within a reasonable time after the plaintiff becomes entitled to the delivery of the chattel, the sheriff may, in his discretion, deliver it to the claimant, without incurring any liability to the plaintiff by reason of so doing.¹

Action Upon Claim Against Sheriff.—A person, not a party to the action, who has served an affidavit as prescribed in section 1709 of the Code, may maintain an action against the sheriff, who has delivered the chattel to the plaintiff, to recover his damages by reason of the taking, detention or delivery of the chattel. But the summons, in such an action, must be issued within three months after the delivery of the chattel to the plaintiff, and must be served within three months after it is issued. In no way, other than this, can an action be maintained against a sheriff by a person so entitled to make a claim.²

Indemnity to Sheriff.—The indemnity to be furnished to the sheriff by the plaintiff, as prescribed in section 1709 of the Code, must consist of a written undertaking to him, executed by at least two sureties, to the effect that they will indemnify him against any liability for damages, costs or expenses to be incurred in an action brought against him by the claimant, or a person deriving title from or through the claimant by reason of the taking or detention of the chattel, or its delivery to the plaintiff, not exceeding a sum to be specified in the undertaking, which must be at least \$500, and not less than the actual value of the chattel claimed, and \$250 in addition thereto. Each of the sureties, besides possessing the other qualifications required by law, must be a freeholder or a householder of the sheriff's county. The sheriff, before delivering the chattel, may require the persons offered as sureties to submit to an examination before the officer who takes the acknowledgment of the undertaking, as where persons are offered to him as bail upon an arrest. The sureties are entitled to be substituted as defendants in an action, brought as prescribed in section 1710 of the Code, as if the chattel had been levied upon by virtue of an execution.³

¹ Code Civ. Pro., § 1709.

² Code Civ. Pro., § 1710.

³ Code Civ. Pro., § 1711.

Affidavit, by Whom Made.—The affidavit, to be delivered to the sheriff in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or, if the plaintiff is not within the county where the attorney resides, or has his office, or is not capable of making the affidavit. The affidavit, to be delivered to the sheriff, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person, not a party, who makes a claim as prescribed in section 1709 of the Code, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant, as the case may be, is not within the county where the property was replevied, and capable of making the affidavit. Where the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief, and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the party or the claimant.¹

Subsequent Replevin.—Where the sheriff has replevied a part only of a chattel, or of two or more chattels, described in the plaintiff's affidavit, and has served upon the defendant the papers required, upon such a replevin, the plaintiff may, at any time before the service of a copy of the defendant's answer, or before judgment by default, for want of an appearance or pleading, require the same, or any other sheriff, to replevy any other part thereof. For that purpose he must deliver to the sheriff an affidavit, containing the same allegations and a requisition and undertaking, with respect to the part yet to be replevied, as if the action was brought to recover that part only. Where a second or subsequent replevin is made, the proceedings are the same as if a former replevin had not been made.²

Replevin Where "Arrest" Granted.—Where an order of arrest is granted, as prescribed in title first of chapter seventh of the Code of Civil Procedure (see *ante*, p. 219), the plaintiff's right to a replevin is subject to the following regulations :

¹ Code Civ. Pro., § 1712.

² Code Civ. Pro., § 1713.

1. If the defendant has been arrested, pursuant to the order, a subsequent replevin cannot be made of a chattel with respect to which the order was granted.

2. If the defendant has not been arrested, a subsequent replevin of a chattel, with respect to which the order was granted, supersedes the order.¹

Sheriff's Return.—The sheriff must, within twenty days after he has delivered a chattel replevied by him to the party entitled to the possession thereof, or to a third person, file with the clerk the plaintiff's affidavit, and the accompanying requisition, with a return, stating in what manner he has executed the latter. If he has omitted to replevy a part of the chattel, or of two or more chattels, described in the affidavit, the return must state the cause of the omission.² If the sheriff fails to comply with the provisions of the Code as to his return, either party may require him so to do within ten days after service of a notice to that effect, or to show cause, at a term of the court designated in the notice, why he should not be punished for a contempt of the court. The notice may be served at any time before final judgment, except that it cannot be served on the part of the defendant before answer. An omission to comply with such a notice is punishable as a contempt of the court.³

Judgment Roll, What to Contain.—The plaintiff's affidavit, with the accompanying requisition, and the return of the sheriff, must be made a part of the judgment roll in the action; and a copy of each of them must be furnished to the court, or the referee, upon the trial of an issue of fact, with a copy of the summons, and of the pleadings.⁴ The plaintiff may proceed in the action, and recover therein the chattel, or its value, although he has not required the sheriff to replevy it, or the sheriff has not been able to replevy it.⁵

Contents of Final Judgment and Docketing.—Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any. If

¹ Code Civ. Pro., § 1714.

² Code Civ. Pro., § 1715.

³ Code Civ. Pro., § 1716.

⁴ Code Civ. Pro., § 1717.

⁵ Code Civ. Pro., § 1718.

a chattel recovered was not replevied, or if, after it was replevied, it was delivered to the defendant, or to a person not a party, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of a chattel, which was replevied, and afterwards delivered to the plaintiff, or a person not a party, final judgment in his favor therefor must award to him possession thereof, with his damages, if any ; and it must also award to him the sum fixed as the value thereof, to be paid to the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in section 1727 of the Code, final judgment in favor of the defendant must award to him the sum, fixed as therein specified, and, if it is not collected, the delivery of the chattel ; or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to possession thereof, until the sum so awarded is collected, or otherwise paid. The judgment may be docketed and the docketing thereof creates a lien, as if it was a judgment for the full amount of the money, including costs, which it awards, either absolutely or conditionally.¹

Contents of Execution.—An execution for the delivery of the possession of a chattel, and to satisfy, out of the property of the judgment debtor, a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law, the following directions :

1. Where the judgment was rendered in favor of the defendant, in a case specified in section 1727 of the Code, the execution must require the sheriff to deliver possession of the chattel to the defendant, unless the plaintiff, before the delivery, pays to him the sum of money awarded to the defendant, with interest and the sheriff's fees ; and, in case the chattel cannot be found within his county, then to satisfy that sum out of the property of the plaintiff.

2. In any other case, where the judgment awards a sum of money, if possession of the chattel is not delivered to the

¹ Code Civ. Pro., § 1730; see Ill. Rev. Stat. of 1874, chap. 119, § 22; *Lamping v. Payne*, 83 Ill., 463; *Kendrick v. Watkins*, 54 Miss., 495.

prevailing party, the execution must require the sheriff, if the chattel cannot be found within his county, to satisfy the sum so awarded, with interest and his fees, out of the property of the party against whom the judgment is rendered.

A direction to satisfy a sum of money out of property, as here stated, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.¹ For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the sheriff are the same, as where he is required to replevy a chattel.²

When Action on Undertaking Maintainable.—A plaintiff, who has recovered a final judgment, cannot maintain an action against the sureties in an undertaking, given in behalf of the defendant to procure a return of the chattel, or against the bail of a defendant, who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant, who has recovered a final judgment, cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return of a similar execution against the plaintiff.³ In such an action against the sureties, the sheriff's return to the execution is presumptive evidence of a failure to deliver or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.⁴ And in such action it is not a defense that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was effected by the act, or with the consent of the plaintiff in the action, or occurred after the chattel was taken by virtue of the execution.⁵

¹ Code Civ. Pro., § 1731.

² Code Civ. Pro., § 1732.

³ Code Civ. Pro., § 1733.

⁴ Code Civ. Pro., § 1734; see *Thompson v. Joplin*, 12 S. C., 580.

⁵ Code Civ. Pro., § 1735.

SECTION V.

OF EXECUTIONS AND OF THE LEVY AND SALE THEREUNDER.

1. *Requisites of Executions.*

To Whom Directed.—An execution must be directed to the sheriff, unless he is a party or interested ; in which case it must be directed as prescribed in section 173 of the Code. But the court may, in its discretion, order an execution, issued upon a judgment rendered against a sheriff, either alone or with another, to be directed to a person, designated in the order, instead of to the coroners, or a particular coroner ; in which case it must be so directed. The person so designated must be of full age, a resident of the State, and not a party to the action, or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so designated executes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be collected by virtue of the execution ; conditioned for the faithful performance of his duties under the execution. A certified copy of the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer ; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.¹

Indorsement.—The sheriff to whom an execution is directed and delivered, must, upon the receipt thereof, indorse thereupon a memorandum of the day, hour, and minute, when he received it.² This indorsement will be held conclusive evidence against him, that the execution was in his hands at the time.³ He must also, if it be required, without compensation, give to the person delivering the same, a minute, in writing, signed by him, specifying the

¹ Code Civ. Pro., § 1362; see *Hibbard v. Smith*, 50 Cal., 511.

² Code Civ. Pro., § 1363.

³ *Williams v. Lowndes*, 1 Hall, 579.

names of the parties, the general nature of the execution, and the day and hour of receiving the same.¹ And upon the request of the defendant in the execution, he must deliver to him, without compensation, a copy of the execution.²

Kinds of Execution.—There are four kinds of execution, as follows:

1. Against property.
2. Against the person.
3. For the delivery of the possession of real property, with or without damages for withholding the same.
4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

An execution is the process of the court, from which it is issued.³

To what Counties Issued.—An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution against the person may be issued to any county. An execution for the delivery of the possession of real property must be issued to the county where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel, may be issued to any county where the chattel is found; or to the sheriff of the county where the judgment roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties.⁴

General Requisites.—An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which the judgment was rendered; and, if it was rendered in the Supreme Court, the county in which the judgment roll is filed. It must require the sheriff to return

¹ Code Civ. Pro., § 100.

² Code Civ. Pro., § 101.

³ Code Civ. Pro., § 1364.

⁴ Code Civ. Pro., § 1365. It has been held in Minnesota that, when one county is attached to another for judicial purposes, an execution required to be issued to the sheriff of the county where the debtor resides, may properly be issued to the sheriff of the principal county, to which the county in which the debtor resides is attached. *Beebe v. Fridley*, 16 Minn., 518; see *Keutzler v. Chicago, Milwaukee, etc., Railway Co.*, 47 Wis., 641.

it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in section 1367 of the Code, it must be made returnable to the clerk, with whom the judgment roll is filed.¹ It should be in the name of the people of the State, written in the English language, on paper or parchment, in a fair legible character, in words at length, and not abbreviated.² It should be tested in the name of a judge of the court out of which it is issued, on the day it is issued. And when issued out of a court of record, it should be subscribed or indorsed by the attorney for the party, or by the person at whose instance it was issued.³ When issued by the clerk it should be subscribed or indorsed by him.⁴ Thus subscribed or indorsed, it is not void or voidable, by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the clerk, unless it was issued by special order of the court.⁵ These same rules apply to all writs and processes. But an execution out of the county court, and signed by an attorney, even if void because not signed by the clerk, will, if nothing appears thereon to notify the sheriff that it was issued upon a transcript of a justice's judgment, protect him in levying upon and holding the property of the judgment debtor.⁶

The time allowed for the return of an execution is for the benefit of the sheriff, to prevent an action or compulsory proceeding against him, before he has had a reasonable time to execute the process. He may, if he choose so to do, return the execution at any time within the sixty days.⁷ But

¹ Code Civ. Pro., § 1366; see *Brevard v. Jones*, 50 Ala., 221.

² Code Civ. Pro., § 22.

³ Code Civ. Pro., §§ 23, 24.

⁴ *People ex rel. Ulton v. Seaton, Sheriff*, 13 Week. Dig., 240; *S. C.*, 25 Hun, 305; *Code Civ. Pro.*, § 24; see *Hernandez v. Drake*, 81 Ill., 34; *McKethan v. McNeill*, 74 N. C., 633; *Blount v. Wells*, 55 Ga., 282.

⁵ *Code Civ. Pro.*, § 24; see *Dailey v. State*, 56 Miss., 475; *Williams v. Ball*, 52 Tex., 603; *Jones v. Dove*, 7 Org., 467; *Smith v. Sweat*, 60 Ga., 539; *Houck v. Cross*, 67 Mo., 151; *Gorman v. Stanton*, 5 Mo. App., 585; *West v. Krebaum*, 88 Ill., 263; *Maury v. Shepperd*, 57 Ga., 68; *Schmidt's Appeal*, 82 Penn. St., 524; *Griswold v. Connolly*, 1 Woods, 193; *Arnold v. Nye*, 23 Mich., 286; *Molison v. Eaton*, 16 Minn., 426; *Burdick v. Shigley*, 30 Iowa, 63; *Linn v. Hamilton*, 34 N. J. L., 305.

⁶ *Hill v. Haynes*, 54 N. Y., 153.

⁷ *Forbes v. Waller*, 25 N. Y., 430; *Renaud v. O'Brien*, 35 id., 99; *Cassidy v. Meacham*, 8 Paige, 469; *Tyler v. Willis*, 33 Barb., 327.

the judgment creditor cannot require him to return it before the sixty days have elapsed.¹

On Transcript From Other Court.—Where an execution is issued out of a court, other than that in which the judgment was rendered, upon filing a transcript of the judgment rendered in the latter court, it must also specify the clerk, with whom the transcript is filed, and the time of filing; and it must be made returnable to that clerk. If the judgment was rendered in a justice's court, it must specify the justice's name; and it must omit the specification respecting the filing of the judgment roll.² Where a judgment, rendered by a justice of the peace, has been docketed with a county clerk, upon the filing either of a transcript from the justice's docket, or of a transcript from the clerk's docket of another county, the execution, to be issued thereupon by the county clerk, must be in the same form, and executed in the same manner, as an execution issued upon a judgment of the county court; except as otherwise prescribed in section 1367 of the Code, and except, also, that where the judgment is for a sum less than twenty-five dollars, exclusive of costs, the direction to satisfy the judgment out of the real property of the judgment debtor must be omitted. In that case the provisions of the Code, relating to the satisfaction of an execution out of the judgment debtor's real property, are not applicable thereto.³ An execution upon a judgment of a district court of the city of New York, docketed in the county clerk's office of the county of New York, and thereby become a judgment of the court of common pleas, may be issued, at the option of the judgment creditor, either by the county clerk, directed to the sheriff, or by the clerk of the district court, directed to a marshal. In the latter case, it must be in the same form, and executed in the same manner, as if the judgment was not so docketed.⁴

¹ *Spencer v. Cuyler*, 10 How. Pr., 157.

² Code Civ. Pro., § 1367; see *Mavity v. Eastridge*, 67 Ind., 211; *Moore v. Lynch*, 4 Baxter (Tenn.), 287.

³ Code Civ. Pro., § 3043.

⁴ Code Civ. Pro., § 3220. It was held before Code Civ. Pro., in *McDonald v. O'Flynn*, 2 Daly, 42, that the execution upon a judgment, recovered in a district court of the city of New York, for more than twenty-five dollars, exclusive of costs, and docketed with the county clerk, should be issued by the

Mechanics' Liens, etc.—Whenever any judgment shall be entered in an action to foreclose a mechanics' lien, execution shall thereupon issue for the enforcement and collection of such judgment, in the same manner as executions are issued upon other judgments, in actions on contract, for the payment of money only, except that when the judgment is in favor of the claimant, the execution shall direct the officer to sell the right, title and interest which the owner, or other party in interest, had in the premises at the time of filing the notice, as prescribed by Laws of 1880, chapter 440, section two; and if the same shall be insufficient to satisfy said judgment, then to collect such deficiency as shall remain out of the personal property of such owner or party in interest; or, if there be two or more, of either of them; or, if sufficient personal property cannot be found, then out of the real property of such owner or party in interest; or, if there be two or more, of either of them, in the county to which said execution is issued, on the day such judgment was docketed in said county, or on any day thereafter. But no such deficiency shall be collected out of any real property, unless such deficiency shall amount to or exceed the sum of twenty-five dollars.¹

Divided County.—Where any county has been, or shall be, divided, any judgment that may have been recovered previous to such division, or after such division, upon any proceedings instituted previous thereto in the court of common pleas of such county, or before any justice of the peace thereof, may be collected by execution, to be issued to the sheriff of the county where such judgment shall have been rendered, or to a constable thereof, as the case may require, who shall execute the same, in the same manner as if such division had not been made, and such judgment may be revived, and the like proceedings may be had thereon, as if such county had not been divided.²

judgment creditor, or his attorney, and not by the county clerk. Also, *held*, that where judgments of the marine court of the city are docketed in the county clerk's office, executions thereon must be issued to the sheriff. *Matter of Lippman*, 48 How. Pr., 359.

¹ Laws of 1880, chap. 440, § 9; 3 R. S. (7th ed.), 2442. For the contents of execution in an action for a chattel, see *ante*, p. , Code Civ. Pro., § 1731, where warrant of attachment has issued, see Code Civ. Pro., § 1370.

² 3 R. S. (7th ed.), § 35, p. 2459; 3 id. (5th ed.), 556, § 35.

Process in New York County, to Whom Issued.—All orders of arrests, warrants of attachment, executions and proceedings, to recover personal property in civil actions, except when the sheriff is a necessary party thereto, made or issuing out of any court of record in the city and county of New York, whether by statute or otherwise, shall be issued to the sheriff only.¹

Actions Against Association.—In an action against an unincorporated association, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property or his person; nor does the docketing thereof, bind his real property or chattels real. Where such judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal property belonging to the association, or owned jointly or in common by all the members thereof, omitting any direction respecting real property.²

Against Public Officer.—An execution cannot be issued upon a judgment for a sum of money, rendered against an officer in an action or special proceeding brought by or against him, in his official capacity, pursuant to article two, title five, chapter fifteen of the Code of Civil Procedure, except where it is rendered against the trustee or trustees of a school district, or the commissioner or commissioners of highways of a town. In either of those cases, an execution may be issued against and be collected out of the property of the officer, and the sum collected must be allowed to him, in the settlement of his official accounts, except as otherwise specially prescribed by law.³ An execution cannot be issued against the people.⁴

On Surrogate's Decree.—Execution upon a surrogate's decree, directing the payment of a sum of money into court, or to one or more parties, must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the

¹ Consol. Act of 1882, § 1717; Laws of 1875, chap. 625; re-enacted, Laws of 1880, chap. 398; 3 R. S. (7th ed.), 2382; see Code Civ. Pro., § 339.

² Code Civ. Pro., § 1921.

³ Code Civ. Pro., § 1931.

⁴ Code Civ. Pro., § 1985.

court, and must be made returnable to the court. The proceedings by the sheriff, for the collection thereof, are the same as upon a Supreme Court execution for the collection of money.¹

For Collection of Money.—An execution, issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify, in the body thereof, the sum recovered, or directed to be paid, and the sum actually due when it is issued. It may specify a day, from which interest upon the sum due is to be computed; in which case, the sheriff must collect interest accordingly, until the sum is paid. If all the parties, against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor.² Unless the execution specifies a day from which interest on the sum due is to be computed, the sheriff need not compute interest on the judgment. And having collected the principal, the creditor cannot trouble the defendant with a second execution for the interest.³

Against Property.—An execution against property must, if the judgment roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county. It must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment out of the personal property of the judgment debtor; and, if sufficient personal property cannot be found, out of the real property belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.⁴

Where Attachment has been Levied.—Where a warrant of attachment, issued in the action, has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him

¹ Code Civ. Pro., § 2554.

² Code Civ. Pro., § 1368.

³ *Todd v. Botchford*, 86 N. Y., 517; *People ex rel Ransom v. Onondaga C. P.*, 3 Wend., 331.

⁴ Code Civ. Pro., § 1369; see *Wright v. Young*, 6 Oreg., 87.

or it, without the State, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of the Code, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is not sufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.' In issuing an execution, in a case where real property is attached, the command to the sheriff should, among other things, require him to satisfy the judgment out of the real property belonging to the judgment debtor, "on the day when the attachment was levied thereon," and on the day when the judgment was docketed.²

Against Executor.—An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee, must substantially require the sheriff to satisfy the judgment, out of that property.³ Such an execution must show upon its face that it is issued against the defendant in his representative capacity, and not against him personally, otherwise it is liable to be set aside.⁴ It is not essential that the word "as" should precede the word signifying the representative capacity.⁵ But an execution upon a judgment against executors, as such, cannot issue against, and be levied upon, the real estate of decedents.⁶

Against the Person.—An execution against the person must substantially require the sheriff, to arrest the judgment debtor, and commit him to the jail of the county,

¹ Code Civ. Pro., § 1370; the common law rule prevails in Iowa, that execution cannot issue in an attachment against the defendant, and a sale thereon is void. See Iowa Code, § 3133; *Welch v. Battern*, 47 Iowa, 147.

² *Woolworth v. Taylor*, 20 Daily Reg., No. 69.

³ Code Civ. Pro., § 1371.

⁴ *Alger v. Conger*, 17 Hun, 45.

⁵ *Fry v. Shehee*, 55 Ga., 208.

⁶ *James v. Beesly*, 4 Redf., 236.

until he pays the judgment, or is discharged according to law. Except where it may be issued, without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued.¹ A body execution is not void or voidable by reason of the omission of the *teste*, and the failure to name the county to which the property execution was issued, and directing the return of the execution "as required by law," instead of within sixty days from the time of its receipt by the sheriff, are defects in form only, and the execution may be amended as to them upon motion *nunc pro tunc*.²

For Delivery of Property, etc.—An execution for the delivery of the possession of real property, or a chattel, must particularly describe the property and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff, to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected, by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.³

Where Separate Sums Awarded.—Where a judgment awards different sums of money, to or against different parties, a separate execution may be issued, to collect each sum so awarded; subject to the power of the court, to control the enforcement of the executions, upon motion, where the collection of one execution will, wholly or partly, satisfy another.⁴

2. Issuing Execution.

Within Five Years.—Except as otherwise specially prescribed by law, the party recovering a final judgment, or

¹ Code Civ. Pro., § 1372.

² People ex rel. Utley v. Seaton, Sheriff, 25 Hun, 305; S. C.; 13 Week. Dig., 240.

³ Code Civ. Pro., § 1373.

⁴ Code Civ. Pro., § 1374.

his assignee, may have execution thereupon, of course, at any time within five years after the entry of the judgment.¹

After Death of Judgment Creditor.—Where the party, recovering a final judgment, has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same.²

After Five Years.—After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only :

1. Where an execution was issued thereupon, within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the execution.³

Notice of an application for an order, granting leave to issue an execution, must be served personally upon the adverse party, if he is a resident of the State, and personal service can, with reasonable diligence, be made upon him therein ; otherwise, notice must be given in such manner as the court directs. Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted, except on proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.⁴ But section 1377 of the Code does not apply to a case in which the judgment debtor is dead.⁵ Such a case would be governed by section 1380 of the Code. But an execution, issued after a lapse of five years, without leave of court, is only voidable ; it would be sufficient protection to the officer until set aside.⁶ A justice's judgment, after transcript filed, is deemed a judgment of the county

¹ Code Civ. Pro., § 1375.

² Code Civ. Pro., § 1376 ; See *Duryee v. Botsford*, 24 Hun, 317.

³ Code Civ. Pro., § 1377 ; *Wade v. DeLeyer*, 40 N. Y. Superior Ct., 541 ; *Reeves v. Plough*, 46 Ind., 350.

⁴ Code Civ. Pro., § 1378.

⁵ *Marine Bank of Chicago v. Van Brunt*, 61 Barb., 361 ; S. C., 11 Hun, 379 ; *aff'd S. C.*, 49 N. Y., 161 ; *Wallace v. Swinton*, 64 id., 188.

⁶ *Wooster v. Wuterick*, 2 Abb. (N. C.), 206.

court, enforceable as such, and the county court may grant leave to issue execution thereon.¹ An execution to collect a sum of money cannot be issued, against the property of a judgment debtor, who has died since the entry of the judgment, except as prescribed in sections 1380 and 1381 of the Code of Civil Procedure.²

Leave Required.—After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money, is rendered, the judgment may be enforced by execution, against any property upon which it is a lien, with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order, granting leave to issue it, is procured from the court, from which the execution is to be issued, and a decree, to the same effect, is procured from a surrogate's court of the State, which has duly granted letters testamentary or letters of administration, upon the estate of the deceased judgment debtor. Where the lien of the judgment was created by the docketing in the county clerk's office, of the judgment rendered since September 1, 1877, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent; and for that purpose such a lien, existing at the decedent's death, continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll.³

Leave, how Obtained.—Leave to issue an execution, as prescribed in the last cited section, must be procured as follows :

1. Notice of the application, to the court, from which the execution is to be issued, for an order, granting leave to issue the execution, must be given to the person or persons, whose interest in the property will be affected by a sale by virtue of the execution, and also to the executor or administrator of

¹ Kincaid v. Richardson, 9 Abb. (N. C.), 315.

² Code Civ. Pro., § 1379.

³ Code Civ. Pro., § 1380; as amended Laws of 1879, chap. 542; see Smith v. Reed, 52 Cal., 345; Eaton v. Youngs, 41 Wis., 507; Beach v. Dennis, 47 Ala., 362; Williams v. Williams, 71 N. C., 427; Isler v. Murphy, id., 436.

the judgment debtor. The general rules of practice may prescribe the manner in which the notice must be given; until provision is so made therein, it must be served, either personally, or in such a manner as the court prescribes, in an order to show cause.. Leave shall not be granted except upon proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.

2. For the purpose of procuring a decree from the surrogate's court, granting leave to issue the execution, the judgment creditor must present to that court, a written petition, duly verified, setting forth the facts, and praying for such a decree; and that the persons, above specified, may be cited, to show cause why it should not be granted. Upon the presentation of such a petition, the surrogate must issue a citation accordingly; and, upon the return thereof, he must make such a decree in the premises, as justice requires.¹

The time during which the person, entitled to enforce a judgment, is stayed from enforcing it, by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not a part of the time, limited for issuing an execution thereupon, or for making an application for leave to issue such an execution.²

The last six sections of the Code cited, do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution, out of any property which belonged to him.³

3. *General Provisions as to Sale Under Execution.*

A sale of real or personal property, by virtue of an execution, or pursuant to the directions contained in a judg-

¹ Code Civ. Pro., § 1381; *Flanagan v. Tinen*, 53 Barb., 587.

² Code Civ. Pro., § 1382; see *Underwood v. Green*, 56 N. Y., 247; *Rosenfeld v. Palmer*, 5 Daly, 318.

³ Code Civ. Pro., § 1383; see *Fabel v. Boykin*, 55 Ala., 383; *Dickinson v. Bowers*, 7 Baxter (Tenn.), 307.

ment or order, must be made at public auction, between the hour of nine o'clock in the morning and sunset.¹

A person who, before the time fixed for the sale, in a notice of the sale of property, to be made by virtue of an execution, wilfully takes down or defaces such a notice put up by the sheriff, or by his authority, forfeits fifty dollars to the judgment creditor, and the same sum to the judgment debtor; unless the notice was defaced or taken down, with the consent of the person seeking to enforce the forfeiture, or the execution was previously satisfied.²

An omission by the sheriff to give notice, as required by law, or the taking down or defacing of a notice, when put up, does not affect the validity of a sale, made by virtue of an execution, to a purchaser in good faith, without notice of the omission or offense.³

Officer Making Sale not to Purchase Thereat.—The sheriff, to whom an execution is directed, or the under sheriff or deputy sheriff, holding an execution, and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him, or to his use, is void.⁴

When Under Sheriff to Proceed.—Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under sheriff must proceed upon the execution, as the sheriff might have done. If there is no under sheriff, the court, from which the execution issued, may designate a person to proceed thereupon; who may complete the same, as an under sheriff might have done. The person so designated must give such security as the court directs. He is deemed an officer; and is subject to the same obligations and liabilities, and has the same power and authority, in relation to the object of his appointment, as a sheriff, and is entitled to fees accordingly. But this section does not apply, in a case where special provision is otherwise made by law, for the enforcement of an execution, after the death, removal from office, or other disqualification of the sheriff or under sheriff.⁵

¹ Code Civ. Pro., § 1384

⁴ Code Civ. Pro., § 1387.

² Code Civ. Pro., § 1385.

⁵ Code Civ. Pro., § 1388.

³ Code Civ. Pro., § 1386.

4. *Plaintiff's Control of Sheriff in Service of.*

The judgment creditor or his attorney, issuing an execution or any other process, has power to qualify its general effect by whatever general directions he may think proper to give. In short, he may give such directions to the sheriff as will not only excuse him from his general duty, but bind him. The attorney may make him *pro tanto* a special agent, by restricting his general power in any way which shall not amount to an abuse of the process, although he cannot enlarge the power. Both the process and the law which confers authority under it, are for the benefit of the party; and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection; and it follows that he may qualify it to a greater or less extent, according to his discretion.¹ Hence, the sheriff may be directed to indorse an execution, as received of a subsequent day, until the arrival of which the execution is dormant, and the sheriff cannot proceed thereunder.² So, too, on an execution against several defendants, the sheriff may be directed to levy upon the property of all or one of them.³ And if the plaintiff, or his attorney, give a deputy sheriff special directions as to the manner of serving or of making an execution, as by enlarging the time, giving credit to a purchaser of land, and prescribing the effect of the purchase and the time, and conditions of its consummation, the sheriff is not accountable for the acts of his deputy under the special arrangements; in so far the officer is not the deputy of the sheriff, but the agent of the plaintiff.⁴ But to discharge the sheriff from liability for the acts of his deputy, it must be shown not only that the plaintiff directed the deputy to depart from the line of duty imposed by law, but that the deputy followed, or, at

¹ *Walters v. Sykes*, 22 Wend., 566; *Smith v. Erwin*, 77 N. Y., 466; *Root v. Wagner*, 30 id., 17; *Armstrong v. Garrow*, 6 Cow., 465; *Ford v. Leche*, 6 Adol. & El., 699.

² *Smith v. Erwin*, 77 N. Y., 466; *Walters v. Sykes*, 22 Wend., 566; *Stern's Appeal*, 64 Penn. St., 447.

³ *Godfrey v. Gibbons*, 22 Wend., 569.

⁴ *Gorham v. Gale*, 7 Cow., 739; *Armstrong v. Garrow*, 6 id., 465; *Mickels v. Hart*, 1 Denio, 548; *Acker v. Ledyard*, 8 Barb., 514; *Robinson v. Brennan*, 11 Hun, 368; *Read v. French*, 28 N. Y., 285; *Mandeville v. Reynolds*, 68 id., 528, 540.

least, undertook to follow the directions given. He cannot otherwise be regarded, in any respect, the agent of the plaintiff.¹

5. *Property Exempt from Levy and Sale.*

Exemption from execution is given by statute. There is no presumption of exemption of property from levy and sale.² Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtor's property, without exception, might be taken on the execution in case of default. By the statutes, exempting certain property, the legislature, in effect, determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property, of limited value, should not be taken. But these laws are to be liberally construed, not only in favor of the debtor, but also in favor of his family. The prominent object of their enactment was to protect the families of debtors, and to prevent their being deprived of every vestige of property by a class of creditors whose selfishness stifles all promptings of humanity.³ The right to such exemption does not always depend upon the fact whether or not the debtor is possessed of other property.⁴

The Code of Civil Procedure does not enumerate all the exemptions that may be claimed under our statutes. Indeed, it calls attention to this fact by the following provision: "The enumeration, in this article, of the property which is exempt from levy and sale by virtue of an execution, does not repeal any special provision of law, relating to such an exemption, which, by its terms, is applicable only to a particular class of persons, or corporations, or to a particular locality, or otherwise to a special case."⁵

¹ *Sheldon v. Payne*, 7 N. Y., 453; S. C., 10 id., 398; *Corning v. Southland*, 3 Hill, 552. *Tuttle v. Cook*, 15 Ward., 274; *McKinley v. Tucker*, 59 Barb., 93; *Ross v. Campbell*, 19 Hun, 615; *Ansonia Brass Co. v. Babbitt*, 74 N. Y., 395.

² *Kraft v. Collins*, 13 Week. Dig., 189.

³ *Kneettle v. Newcomb*, 22 N. Y., 249; *Wilcox v. Hawley*, 31 id., 658; *Woodward v. Murray*, 18 Johns., 400; *Becker v. Becker*, 47 Barb., 497; *Frazier v. Lys*, 10 Neb., 115; *Hitchcock v. Holmes*, 43 Conn., 528; *Rasure v. Hart*, 18 Kan., 340.

⁴ *Wilcox v. Hawley*, 31 N. Y., 658.

⁵ Code Civ. Pro., § 1389.

We will first enumerate the Code provisions, and then collect the general statutes.

Householder's Exemption.—The following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution; and each moveable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another:

1. All spinning wheels, weaving looms and stoves, put up, or kept for use, in a dwelling-house; and one sewing-machine, with its appurtenances.

2. The family bible, family pictures, and school-books, used by or in the family; and other books, not exceeding in value fifty dollars, kept and used as part of the family library.

3. A seat or pew, occupied by the judgment debtor, or the family, in a place of public worship.

4. Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour and vegetables, actually provided for family use; and necessary fuel, oil and candles, for the use of the family for sixty days.

5. All wearing apparel, beds, bedsteads, and bedding, necessary for the judgment debtor and the family; all necessary cooking utensils; one table; six chairs; six knives; six forks; six spoons; six plates; six tea cups; six saucers; one sugar dish; one milk pot; one tea pot; one crane and its appendages; one pair of andirons; one coal-scuttle; one shovel; one pair of tongs; one lamp, and one candlestick.

6. The tools and implements of a mechanic, necessary to the carrying on of his trade, not exceeding in value twenty-five dollars.⁴

In addition to the above exemptions, necessary household furniture, working-tools and team, professional instruments, furniture and library, not exceeding in value \$250, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the

⁴ Code Civ. Pro., § 1390.

execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic, or for the purchase-money of one or more articles, exempt as prescribed in sections 1390 and 1391 of the Code of Civil Procedure.¹ Where the judgment debtor is a woman, she is entitled to the same exemptions, subject to the same exceptions as are prescribed for a householder in those sections of the Code.²

A single horse and his harness are a team within the meaning of the Code. And it is sufficient for a party claiming the exemption of his horse from sale on execution, to show that the horse constitutes his team; that he is a householder; and that his household furniture, workman's tools and team do not, in the aggregate, exceed in value the sum of \$ 250.³ Necessary vegetables are exempt, not only when stored for family use, but as well in any stage of the process of obtaining them for that use, whether by planting or otherwise.⁴ A wagon may be exempt as constituting part of a team.⁵ And in determining whether a team or tools are

¹ Code Civ. Pro., § 1391.

² Code Civ Pro., § 1392. For exemption laws of other States, respectively, see N. C. Rev. Code, chap. 45, §§ 7, 8; *Carlton v. Watts*, 82 N. C., 212; Ga. Code, § 2040; Ga. Const., 1868; *Flanders v. Wells*, 61 Ga., 195; Neb. Gen. St., 618; *Frazier v. Syas*, 10 Neb., 115; *Williams v. Golden*, id., 432; La. Code, art. 644; *White v. Heffner*, 30 La. An., part II, 1280; Ill. Rev. Stat., 499, § 13; *Washburn v. Goodheart*, 88 Ill., 229; Iowa Code, § 3072; *VanDoran v. Marden*, 48 Iowa, 186; S. C., Act of Feb. 22, 1873, No 308, of 15 Gen. Stat., 369; *Prince v. Nance*, 7 S. C., 351; Miss. Code, 1871, § 8; *Cayce v. Stovall*, 50 Miss., 396; Texas, Act of 1866; *Nichols v. Clairborne*, 39 Tex., 363; Wis. Rev. Stat., chap. 134, § 31; *Connaughton v. Sands*, 32 Wis., 387; Tay. Stat., 1553, chap. 134, § 40 (Wis.); *Kuntz v. Kinney*, 33 Wis., 503; *Seeley v. Gwillion*, 40 Conn., 107; Miss. Laws of 1865, 187; Code 1857, art. 280, 281; Mich. Comp. Laws, §§ 4466, 4467; *Alvord v. Lent*, 23 Mich., 369; Ala. Rev. Code, 2884; *Brewer v. Granger*, 45 Ala., 580; Mass. Gen. Stat., chap. 123, § 32, chap. 133, § 32, cl. 5; *Pond v. Kimball*, 101 Mass., 105; Cal. Pr. Act., § 219; *Robert v. Adams*, 38 Cal., 383; Iowa Rev. Stat., § 3304; *Corp v. Griswold*, 27 Iowa, 379; *Collier v. Latimer*, 8 Baxter (Tenn.), 420.

³ *Wilcox v. Hawley*, 31 N. Y., 658; *Cogsdill v. Brown*, 5 Hun, 341; *Smith v. Slade*, 57 Barb., 637; *Finnin v. Malloy*, 33 Supr. Ct. (1 J. & S.), 382; an ascertained or one-half interest in a horse, is as much exempt from execution as an entire horse. *Rutledge v. Rutledge*, 8 Baxter (Tenn.), 33; *Re Peabody*, 16 Bankr. Req., 243.

⁴ *Carpenter v. Herrington*, 25 Wend., 370.

⁵ *Brown v. Davis*, 9 Hun, 43; *Rodgers v. Ferguson*, 32 Tex., 533.

"necessary," it is immaterial whether or not the debtor had other property.¹ The exemption of a "necessary team" may be claimed by a country physician, or any other professional man who uses the "team" in his business." The word "team" as used in our language and in this country, has a broader and more extensive meaning than that given in our dictionaries. A horse or other animal trained and used for labor and service, when it constitutes the motive power to accomplish such labor and service, is a team according to the popular and statutory meaning of the word.² A team may consist of one, two, three, four or more animals.³ The surgical instruments of a physician are exempt as his "tools."⁴ A watch may be exempt as a "working tool," if actually necessary to the discharge of the debtor's business, and not merely a convenience.⁵ But a threshing machine may not be deemed a "working tool."⁶ The building in which a photographer carries on his business, although personal property, is not a "tool" and exempt.⁷ A lamp and other articles necessary to a jeweller's business are his "working tools."⁸ A law exempting tools cannot be construed as protecting the tools, apparatus and machinery of a manufacturing corporation.⁹ "Working tools" may include a net and boat of a fisherman, although large enough to require two men to operate them.¹⁰ The fleeces or the yarn or cloth manufactured from the fleeces of ten sheep, are exempt while in the hands of a householder, whether he be

¹ *Reinecke v. Flecke*, 3 J. & Sp., 491; *Wheeler v. Cropsey*, 5 How. Pr., 288; *Smith v. Slade*, 57 Barb., 637; *Fields v. Moul*, 15 Abb. Pr., 6.

² *Wheeler v. Cropsey*, 5 How. Pr., 288; *Eastman v. Caswell*, 8 id., 75; *Van Buren v. Loper*, 29 Barb., 388; *Corp v. Griswold*, 27 Iowa, 379. A stallion not used as a work horse on a farm is not exempt. *Roberts v. Adams*, 38 Cal., 383.

³ *Finnin v. Malloy*, 33 Supr. Ct. (1 Jones & Sp.), 382, per Spencer, J.; *Wilcox v. Hawley*, 32 N. Y., 648.

⁴ *Wilcox v. Hawley*, *supra*.

⁵ *Robinson's Case*, 3 Abb. Pr., 466.

⁶ *Bitting v. Vandenburg*, 17 How. Pr., 80; *Deposit, etc. Bank v. Wickham*, 44 How. Pr., 421; *Rothschild v. Boelter*, 18 Minn., 361.

⁷ *Ford v. Johnson*, 34 Barb., 364.

⁸ *Holden v. Stranahan*, 48 Iowa, 70.

⁹ *Requillard v. Bartlett*, 19 Kan., 382.

¹⁰ *Boston Belting Co. v. Ivens*, 28 La. Ann., 695; *Seeley v. Guillion*, 40 Conn., 107. *Pond v. Kimball*, 101 Mass., 105.

¹¹ *Sammis v. Smith*, 1 Thomp. & C., 444.

or be not the owner of sheep.¹ Clothing of one, not the householder, but living with the family and furnishing it for himself, is not exempt.² Bags not appearing to be necessary for actual use in preserving exempt articles are not exempt.³

A statute which exempts from attachment or execution, necessary household furniture, may properly be construed as including more than what is absolutely indispensable; it embraces articles which, to the common understanding, are required for comfort and convenience. But the meaning ought not to be enlarged by the station in life or previous habits of the individual, as is allowable in determining what are necessities for a wife, or a minor.⁴

A statutory exemption of property in favor of the "head of a family" or a "householder," cannot be allowed out of assets owned in partnership. It cannot be allowed to the partners jointly or as a firm, because a firm cannot be the head of a family. It cannot be allowed to them severally, or as individuals; as such the partners are interested only in the proceeds remaining after payment of debts.⁵ This, to us, seems correct and sound reasoning. But the rule in our State is to the contrary. The New York court of appeals have decided that the exemption extends to a firm, where the execution issued upon a judgment for a firm debt, and was levied on firm property, such as the statute exempts to a householder or head of a family.⁶ At common law *the necessary wearing apparel of every debtor* is exempt from levy and sale on execution.⁷

Who is a Householder.—As defined in Bouvier's Law Dictionary the word "householder" means master or chief

¹ Hall v. Penney, 11 Wend., 44; Brackett v. Watkins, 21 id., 68.

² Bowne v. Witt, 19 Wend., 475.

³ Shaw v. Davis, 55 Barb., 389. Potatoes originally provided for family use are exempt, although the owner is, on the way to exchange them for groceries necessary for family use. Id.

⁴ Hitchcock v. Holmes, 43 Conn., 528.

⁵ State v. Spencer, 64 Mo., 355; Gaylord v. Imhoff, 26 Ohio St., 317.

⁶ Stewart v. Brown, 37 N. Y., 350.

⁷ Bumpus v. Maynard, 38 Barb., 626. In Bowne v. Witt, 19 Wend., 475, the debtor claimed an exemption of his apparel, under the statute. The point was decided against him, because he was not a householder. He did not claim a common-law exemption.

of a family ; one who keeps house with his family.' The exemption in favor of the householder continues, although he has absconded, and his family were on the highway with his effects, in the act of removal from his residence. So long as the family remain together *as a family*, though the householder has absconded, the privilege remains.² A boarding-house keeper is a householder.³ A keeper of a house of ill-fame may be a householder.⁴ A man who lives with his daughter, whom he supports, is a householder.⁵ One who has children, whom he maintains, though they be temporarily absent at school, is a householder.⁶ Although, in general, it is the husband, father or mother who is the head of the family, yet, where a son of full age assumes the obligation of providing for a widowed mother and her children, with whom he lives, and who are dependant upon him, he is, in legal contemplation, a householder.⁷ A widow continuing to reside in the house occupied by her husband in his life-time, and there caring for and maintaining the minor children, is a householder, and the exempt property of her husband continues exempt in her hands,⁸ even though she remarry.⁹ A householder does not lose the character by temporarily ceasing to keep house, and storing his property, with a view to returning to house-keeping again.¹⁰

Property of which the debtor is a part owner is exempt, if within the description of the statute.¹¹

Military Pay, etc.—The pay and bounty of a non-commissioned officer, musician or private, in the military or naval service of the United States ; a land warrant, pension

¹ And see *Bowee v. Witt*, 19 Wend., 475; *Woodward v. Murray*, 18 Johns., 400.

² *Woodward v. Murray*, 18 Johns., 400; but see *Orr v. Box*, 22 Minn., 485.

³ *Hutchinson v. Chamberlain*, 11 N. Y. Leg. Obs., 248; *Race v. Oldridge*, 90 Ill., 250; *Vanderhorst v. Bacon*, 38 Mich., 669.

⁴ *Bowman v. Quackenboss*, 3 Code R. 17.

⁵ *Cox v. Stafford*, 14 How. Pr., 519; *Cantrell v. Conner*, 51 How. Pr., 45.

⁶ *Robinson's Case*, 3 Abb. Pr., 466; and see *Seaton v. Marshall*, 6 Bush. (Ky.), 429.

⁷ *Connaughton v. Sands*, 32 Wis., 387.

⁸ *Becker v. Becker*, 47 Barb., 497.

⁹ *Brigham v. Bush*, 33 Barb., 596.

¹⁰ *Cantrell v. Connor*, 6 Daly, 224; *Griffin v. Sutherland*, 14 Barb., 456.

¹¹ *Radcliff v. Wood*, 25 Barb., 52.

or other reward, heretofore or hereafter granted by the United States, or by a State, for military or naval services ; a sword, horse, medal, emblem, or device of any kind, presented, as a testimonial, for services rendered in the military or naval service of the United States ; and the uniform, arms, and equipments, which were used by a person in that service, are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding.¹ The exemption of pay and bounty, does not extend to property purchased with or otherwise voluntarily obtained in exchange for the same.²

Right of Action, etc..—A right of action to recover damages, or damages awarded by a judgment, for taking or injuring personal property, exempt by law from levy and sale, by virtue of an execution, are exempt, for one year after the collection thereof, from levy and sale, by virtue of an execution, and from seizure in any other legal proceeding.³

Burying Ground..—"Land, set apart as a family or private burying ground, and heretofore designated, as prescribed by law, in order to exempt the same, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, upon the following conditions only :

1. A portion of it must have been actually used for that purpose.

2. It must not exceed in extent one-fourth of an acre.

3. It must not contain, at the time of its designation, or at any time afterwards, any building or structure, except one or more vaults, or other places of deposit for the dead, or mortuary monuments."⁴

"In order to designate land, to be exempted as prescribed in the last section, a notice, containing a full description of the land to be exempted, and stating that it has been set apart for a family or private burying ground, must be subscribed by the owner ; acknowledged or proved and certified, in like manner as a deed to be recorded in the county where the land is situated ; and recorded in the office of the

¹ Code Civ. Pro., § 1393.

² *Wygant v. Smith*, 2 Lans., 185.

³ Code Civ. Pro., § 1394.

⁴ Code Civ. Pro., § 1395.

clerk or register of that county, in the proper book for recording deeds, at least three days before the sale of the land, by virtue of the execution.”¹

Homestead.—“A lot of land, with one or more buildings thereon, not exceeding in value \$1,000, owned, and occupied as a residence, by a householder having a family, and heretofore designated as an exempt homestead, as prescribed by law, or hereafter designated for that purpose, as prescribed in the next section, is exempt, from sale, by virtue of an execution, issued upon a judgment, recovered for a debt contracted after the 30th day of April, eighteen hundred and fifty, unless the judgment was recovered wholly for a debt or debts, contracted before the designation of the property, or for the purchase-money thereof.”²

“In order to designate property, to be exempted as prescribed in the last section, a conveyance thereof, stating, in substance, that it is designed to be held as a homestead, exempt from sale by virtue of an execution, must be recorded, as prescribed by law; or a notice, containing a full description of the property, and stating that is designed to be so held, must be subscribed by the owner, acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated; and must be recorded by the clerk of that county, in a book, kept by the clerk for that purpose, and styled the ‘homestead exemption book.’ ”³

“A lot of land, with one or more buildings thereon, owned by a married woman, and occupied by her as a residence, may be designated as her exempt homestead, as prescribed in the last section; and the property so designated is exempt from sale, by virtue of an execution, under the same circumstances, and subject to the same exceptions, as the homestead of a householder, having a family.”⁴

“The exemption, prescribed by the last three sections, continues, after the death of the person in whose favor the property was exempted, as follows:

1. If the decedent was a woman, it continues, for the benefit of her surviving children, until the majority of the youngest surviving child.

¹ Code Civ. Pro., § 1396.

³ Code Civ. Pro., § 1393.

² Code Civ. Pro., § 1397.

⁴ Code Civ. Pro., § 1399.

2. If the decedent was a man, it continues, for the benefit of his widow and surviving children, until the majority of the youngest surviving child, and until the death of the widow.

But the exemption ceases earlier, if the property ceases to be occupied, as a residence, by a person for whose benefit it may so continue, except as otherwise prescribed in the next section.”¹

“The right to exemption, of a person entitled thereto, as prescribed in the last four sections, is not affected by a suspension of the occupation of the exempt property, as a residence, for a period not exceeding one year, which occurs in consequence of injury to, or destruction of, the dwelling house upon the premises.”²

“The exemption of a homestead, otherwise valid under the provisions of this article, is not void, because the value of the property, designated as exempt, exceeds \$1,000. In that case, the lien of a judgment attaches to the surplus, as if the property had not been designated as an exempt homestead; but the property cannot be sold by virtue of an execution, issued upon a judgment, as against which it is exempt. After the return of such an execution, the owner of the judgment may maintain a judgment creditor’s action, to procure a judgment, directing a sale of the property, and enforcing his lien upon the surplus.”³

“Where the judgment, in a judgment creditor’s action, brought as prescribed in the last section, or in any other action affecting the title to an exempt homestead, directs the sale of the property, the court must so marshal the proceeds of the sale, that the right and interest of each person in the proceeds, shall correspond, as nearly as may be, to his right and interest in the property sold. Money, not exceeding \$1,000, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, as the property sold was exempt; unless, before the expiration of the year, he causes real property to be designated as an exempt homestead, as prescribed in section 1398 of this act; in which case, the exemption ceases,

¹ Code Civ. Pro., § 1400.

² Code Civ. Pro., § 1401.

³ Code Civ. Pro., § 1402.

with respect to so much of the money, as was not expended for the purchase of that property ; and the exemption of the property so designated extends to every debt, against which the property sold was exempt. Where the exemption of property, sold as prescribed in this section, has been continued after the judgment debtor's death, or where he dies after the sale, and before the payment to him of his proportion of the proceeds of the sale, the court may direct that portion of the proceeds, which represents his interest, to be invested, for the benefit of the person or persons, entitled to the benefit of the exemption ; or to be otherwise disposed of, as justice requires." ¹

"The owner of real property, exempt as prescribed in this article, may, at any time, subscribe a notice, and personally acknowledge the execution thereof, before an officer, authorized by law to take the acknowledgment of a deed, to the effect, that he cancels all exemptions from levy or sale by virtue of an execution, affecting the property, or a particular part thereof, fully described in the notice. The cancellation takes effect when such a notice is recorded, as prescribed in this article for recording a notice to effect the exemption so cancelled. Any other release or waiver, hereafter executed, of an exemption of real property, allowed by this article, or of an exemption of a homestead, or a private or family burying ground, allowed by the provisions of law heretofore in force, is void. A mortgage, hereafter executed, upon property so exempt, is ineffectual, until the exemption has been cancelled, as prescribed in this section ; except that such a mortgage is valid, to the extent of the purchase-money of the same property, secured thereby." ²

The homestead exemption is a mere personal privilege, which the statute secures to the debtor, and to his widow

¹ Code Civ. Pro., § 1403.

² Code Civ. Pro., § 1404. For the laws of other States, respectively, as to homesteads, see *Re Radway*, 3 *Hugh. C. C.*, 609; *Ga. Const.*, 1868; *Eckols v. Reeves*, 61 *Ga.*, 214; *King v. Sturgis*, 56 *Miss.*, 606; *Singletary v. Singletary*, 31 *La. Ann.*, 374; *Gilbert v. Cowan*, 3 *Lea (Tenn.)*, 203; *Mouriquand v. Hart*, 22 *Kan.*, 594; *Neb. Civ. Code*, § 521; *Axtell v. Warden*, 7 *Neb.*, 182; *Ky. Homestead Exemption, Act of 1866*; *Kibbey v. Jones*, 7 *Bush (Ky.)*, 248; *Bemis v. Driscoll*, 101 *Mass.*, 418; *Ala. Rev. Code*, §§ 2880, 2881; *Bell v. Davis*, 42 *Ala.*, 460; *Vt. Gen. Stat.*, chap. 68, § 1; *Vt. Comp. Stat.*, chap. 65, § 6; *West River Bank v. Gale*, 42 *Vt.*, 27.

and children after his decease, which does not run with the land, and which cannot be transferred to another with the land.¹ The act does not affect the rights of creditors to redeem from execution sales, made under judgments docketed prior to the record of the notice of exemption.² The exemption does not hold against a judgment for tort, or in favor of a defendant for costs.³

Statutory Exemptions Outside the Code.—All materials procured, or partly procured, under a contract with the canal commissioners, shall be exempt from execution. Lands actually used and occupied for cemetery purposes are exempt.⁴ Under this act it might be, that upon the sale on execution of a farm, the family burying ground, if there be one upon it in actual use, would have to be reserved. The shares held by members of associations, incorporated under Laws of 1872, chap. 820, an act to authorize the formation of corporations to provide the members thereof with lots of land, suitable for homesteads, together with any amounts of deposits or assessments made on account thereof, are exempt to an extent not exceeding \$1,000; in such shares, deposits or assessments at their par value, provided the person holding such shares, is not the owner of a homestead.⁵ All articles of machinery, materials for manufacturing or manufactured articles, belonging to any company incorporated for the purpose of manufacturing cotton, woolen or linen yarns or cloths, and whose capital actually employed for such purpose, shall exceed the sum of \$25,000, and the number of men employed about the manufactory shall not be less than fifty, shall be free from seizure by execution or distress, for any debts or claims for rents or services, in whose hands soever they may be, except such execution or claim be against such company.⁷ Articles, goods, wares,

¹ *Smith v. Brackett*, 36 Barb., 571; *Allen v. Cook*, 26 Barb., 374.

² *Rice v. Davis*, 7 Lans., 393.

³ *Schonton v. Kilmer*, 8 How. Pr., 527; *Lathrop v. Singer*, 39 Barb., 396; *Cook v. Newman*, 8 How. Pr., 523.

⁴ Laws of 1882, 321, § 6; 1 R. S. (5th ed.), 586; 1 R. S. (6th ed.), 651; 1 R. S. (7th ed.), 632.

⁵ Laws of 1879, chap. 310; 2 R. S. (7th ed.), 1700.

⁶ 2 R. S. (6th ed.), 717; 2 R. S. (7th ed.), 1719.

⁷ Laws of 1815, chap. 202; 2 R. S. (5th ed.), 655; *id.* (6th ed.), 497; 2 *id.* (7th ed.), 1729.

merchandise or property of any description, while the same is en route to or from, or while on exhibition or deposited by exhibitors, at any international exhibition, held under the auspices or supervision of the United States, within any city or county of this State, is exempt in the hands of the authorities of such exhibition or otherwise.¹

The shares held by the members of all associations incorporated under the provisions of Laws of 1851, chapter 122, entitled an act for the incorporation of building, mutual loan and accumulating fund associations, shall be exempt from sale, on execution, for debt, to an extent not exceeding \$600, in such shares, at their par value.² The property of any association, formed pursuant to Laws of 1866, chapter 273, an act authorizing the incorporation of associations to erect monuments to perpetuate the memory of soldiers, who fell in defense of the Union, is exempt from levy and sale on execution.³

When no Exemption as Against Working Women.—In an action brought in either of the district courts of the city of New York, by a female, to recover for services performed by her, if the plaintiff recovers a judgment for a sum not exceeding fifty dollars, exclusive of costs, no property of the defendant is exempt from levy and sale, by virtue of an execution against property, issued thereupon; and, if such execution is returned wholly or partly unsatisfied, the clerk must, upon the application of the plaintiff, issue an execution against the person of the defendant, for the sum remaining uncollected. A defendant, arrested by virtue of an execution so issued against his person, must be actually confined in jail, and is not entitled to the liberties thereof, but he must be discharged after having been so confined fifteen days. After his discharge, an execution against his person cannot be issued upon the judgment; but the judgment creditor may enforce the judgment against property, as if the execution, from which the judgment debtor is discharged, had been returned without his being taken.⁴

¹ Laws of 1880, chap. 393; 3 R. S. (7th ed.), 1960.

² Laws of 1851, chap. 122; 2 R. S. (5th ed.), 784; id. (6th ed.), 704; 2 R. S. (7th ed.), 1765.

³ Laws of 1866, chap. 273, § 6; 2 R. S. (7th ed.), 1710.

⁴ Code Civ. Pro., § 3221; Consol. Act of 1882, § 1086.

Exemption, when and how Claimed.—Sheriffs and their deputies must refrain from taking or interfering with that class of property, belonging to a householder, specifically exempted by statute, without regard to value or to the number of things the debtor owns of the same kind or class ; otherwise they act at their peril. But this is not the rule where the debtor has a number of articles of the same kind or class, one or more of which, or to a certain value, the statute exempts. In such case, the officer may levy upon certain of the articles, taking care that sufficient remains to the debtor to satisfy the statutory exemption as to number and value ; then, within a reasonable time after knowledge of the levy, the debtor *must* make his election, and give notice to the officer if he claims as exempt the property levied upon.¹

A judgment debtor has the right to claim exemption for any portion of his property that falls within the class or character defined by the statute. If he has two teams working in his business, he has the right to claim either as exempt. If the one he elects to claim as exempt has been levied upon, he may say to the officer making the levy—in *any words* that plainly signify his meaning—“I claim this team as exempt by law from execution ;” thereby the property thus designated is protected by the statute, and the officer proceeds further with it at his peril. If the officer chooses to proceed, the debtor, to recover against him, need only to show, as to his choice or election, that he told the officer, substantially, that he claimed the property as exempt ; such notice is a choice or selection.² Where there are several articles used together that answer to the descriptive words, in the statute, as “working tools” or “working team,” “necessary household furniture, etc.,” and the same exceed in value the sum stated in the statute, the debtor has the right to separate and divide the articles, and break

¹ Brooks v. Hathaway, 8 Hun, 290; Seaman v. Luce, 23 Barb., 240; Smith v. Slade, 57 id., 641; Twinam v. Swart, 4 Lans., 263; Brown v. Davis, 9 Hun., 43; Turner v. Borthwick, 20 id., 119.

² Finnin v. Malloy, 33 Supr. Ct. (1 Jones & Sp.), 382; Clark v. Bond, 7 Baxter (Tenn.), 288; State v. Kurtzeborn, 2 Mo. App., 335; Daniels v. Hamilton, 52 Ala., 105; Finley v. Sly, 44 Ind., 266; Meitzler's Appeal, 73 Penn. St., 368; O'Donnell v. Segar, 25 Mich., 367.

up the combination, and retain any number or portion of the same, whose total value does not exceed the statutory sum. As, for instance, if the debtor's team consists of two or more horses, or other animals, each valued at \$250, and a wagon valued at \$200, and harness valued at fifty dollars, he may claim as exempt any portion of the team, not exceeding \$250 in value. He may take either horse or other animal, or he may take the wagon and harness;¹ but it is doubtful if he could claim, as exempt, an undivided portion of each of two or more of the animals, or of each of the chattels together constituting the team. His election should be a reasonable one.

A debtor's right to the statutory exemption of goods, is strictly personal, and does not avail another.² So a naked bailee of goods, which are exempt from execution, cannot maintain trespass for taking them on execution against the owner.³

Exemption, how Waived.—An execution debtor may waive his statutory right of exemption, either by words or by acts plainly indicating such intention;⁴ except, if any part of the judgment was for the sale of intoxicating liquors, a levy and sale upon exempt property, even with his consent, would be void.⁵ The exemption, however, cannot be waived by any stipulation made cotemporaneous with, and as part of, the contract upon which judgment was recovered.⁶ No act of the wife, in the absence of her husband, will constitute a waiver of an exemption by her husband.⁷ Mere silence, on the part of the debtor, will not constitute a waiver of his rights, where the officer takes in execution all his property, whether exempt or not, as where he levies upon an entire lot of sheep, ten of which are exempt under the statute. The mere silence of a party, while

¹ *Finnan v. Malloy*, 33 Supr. Ct. (Jones & Sp.), 382; *Plimpton v. Sprague*, 47 Vt., 467.

² *Earl v. Camp*, 16 Wend., 562; *Smith v. Hill*, 22 Barb., 656.

³ *Mickles v. Tousley*, 1 Cow., 114.

⁴ *Mickles v. Tousley*, *supra*; *Earl v. Camp*, *supra*; *Hogg v. Littlefield*, 68 Me., 52.

⁵ Laws of 1842, chap. 157, § 3.

⁶ *Kneetle v. Newcomb*, 22 N. Y., 249; *Crawford v. Lockwood*, 9 How. Pr., 547; *Moxley v. Ragan*, 10 Bush. (Ky.), 156.

⁷ *Woodward v. Murray*, 18 Johns, 400.

an officer is stripping him of property exempt from seizure, under color of legal authority, furnishes no protection to the wrong doer.¹

6. *Lien of Execution Upon Personal Property.*

The goods and chattels of a judgment debtor, not exempt by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed, but not before.² But for the enforcement of the lien of an execution, a levy and sale is necessary, and the levy must be made during the life-time of the execution; and no constructive levy can arise, or be presumed, from the mere delivery of the execution. The goods cannot be seized after the return day, and the writ then ceases to be of any force; the right of the sheriff under it is at an end, and all claim to a lien lost.³ The liability of property to be sold under legal process, must be determined by the law of the State where it is situated, rather than that of the jurisdiction where the owner lives.⁴

What are Goods and Chattels, not Exempt, etc.—Everything of a personal nature, which is not exempt by statute or at common law, except choses in action, are subject to levy and sale upon execution. Within the term "goods and chattels" are included franchises,⁵ crops, growing or gathered, except such as are the annual products of the soil, growing without cultivation, as grass or ungathered fruit,⁶ rolling stock of a railroad company,⁷ money,⁸ bills or

¹ Frost v. Mott, 37 N. Y., 251.

² Code Civ. Pro., § 1405.

³ Walker v. Henry, 85 N. Y., 130; Hathaway v. Howell, 54 id., 97.

⁴ Hervey v. Rhode Island Locomotive Works, 93 U. S. (3 Otto), 664.

⁵ 1 Bouv. Law Dict., 611.

⁶ Stewart v. Doughty, 9 Johns., 108; Whipple v. Foot 2 id., 418; Bank v. Crary, 1 Barb., 542; Shepard v. Philbrick, 2 Denio, 174.

⁷ Beardsley v. Ontario Bank, 31 Barb., 619; Stevens v. Buffalo etc., Co., id., 590; Bement v. Plattsburgh, etc., Co., 47 id., 104.

⁸ Code Civ. Pro., § 1410.

other evidences of debt, issued by a moneyed corporation to circulate as money,¹ fixtures,² etc. But goods acquired by the defendant in the execution, after the return day thereof, cannot be levied on.³ Nor can the sheriff take goods already levied on, under a justice's execution, though such levy was subsequent to the delivery to him of the execution which he holds.⁴ One who keeps the sheep of another, in consideration of receiving their wool, has no leviabie interest until shearing time.⁵ Ordinarily, however, the lessee of chattels for a term has a leviabie interest.⁶ But an interest in chattels, acquired under a conditional sale, is not subject to execution until the performance of the condition.⁷ But when the purpose for which the possession of the property is delivered to the buyer is inconsistent with the continued ownership of the claimant, as where liquors are delivered to a tavern keeper to be retailed, and the liquor merchants retain the title until the liquor is sold, the transaction will be presumed fraudulent as against creditors and purchasers, and the property may be taken on execution against the vendee in the conditional sale.⁸ A fraudulent purchaser of goods acquires no title as against the vendor, and has no interest which can be seized on execution.⁹

Fixtures.—Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold, are fixtures, and liable to levy and sale, as "goods and chattels," upon execution.¹⁰ The statute defines what shall be fixtures as between the personal representative and the heir,¹¹ but as between vendor

¹ Code Civ. Pro., § 1411.

² Bouv. Law Dict.

³ Devoe v. Elliott, 2 Cal., 243.

⁴ Marsh v. Lawrence, 4 Cow., 461.

⁵ Hasbrouck v. Bouton, 60 Barb., 413; S. C., 41 How. Pr., 208.

⁶ Van Antwerp v. Newman, 2 Cow., 543; Otis v. Wood, 3 Wend., 498.

⁷ Cole v. Mann, 62 N. Y., 1; Herring v. Hoppock, 15 id., 409; Strong v. Taylor, 2 Hill, 326; Bradshaw v. Warner, 54 Ind., 58; Powell v. Preston, 1 Hun, 513.

⁸ Bonesteel v. Flack, 41 Barb., 435; S. C., 27 How. Pr., 310.

⁹ Root v. French, 13 Wend., 570.

¹⁰ 1 Bouv. Law Dic., 593.

¹¹ 2 R. S., 83, §§ 6, 7.

and purchaser, the statute rule does not prevail. In making a levy, the sheriff must frequently decide what are fixtures which may be seized as "goods and chattels." To do this, he should determine if the article sought to be levied upon, would, as between a vendor and vendee, pass by a deed of the real estate without special enumeration or description. As between vendor and vendee, the *mode* of annexation is not the controlling test. The purpose of the annexation, and the intent with which it was made, is in such cases the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force, with which the thing is attached, as upon the motive and intention of the party in attaching it. If the article is attached for temporary use, with the intention of removing it, it is not a fixture, and may be levied upon. If it was placed there for the purpose and with the intent of permanently improving the freehold, it would pass by a deed of the freehold without special mention or description.

As a general rule, deducible from the cases, it may be said that an article will pass with the realty, as a part thereof, without special enumeration or description, if it be annexed to the realty or to an appurtenant thereto, in a manner suitable for permanent use, with the realty or with an appurtenant thereto, when no contrary intention or purpose is manifested in the act or at the time of the annexation, and the article is applied to the use or purpose to which that part of the realty to which it is connected is appropriated. But, if it be manifested *in any way*, that the intent of the party in making the annexation, was to use the article temporarily in connection with the realty or its appurtenant, and then to remove it again, it continues a mere fixture, and is subject to levy and sale on execution.¹

¹ *McRea v. Central Nat. Bank of Troy*, 66 N. Y., 489; *Potter v. Cromwell*, 40 id., 287; *Ward v. Kilpatrick*, 85 id., 413; *Sisson v. Hibbard*, 75 id., 542; *McKeage v. Hanover Fire Ins. Co.*, 81 id., 38; *Globe Marble Mills Co. v. Quinn*, 76 id., 23; *Teaff v. Hewitt*, 1 *McCook* (Ohio), 511, 529, 530; *Fifield v. Maine, Central R. R. Co.*, 62 Me., 77; *Coleman v. Stearns Manuf. Co.*, 38 Mich., 30; *Warner v. Kenning*, 25 Minn., 173; *Robertson v. Corsett*, 39 Mich., 777; *Keeler v. Keeler*, 31 N. J. Eq., 181; *Towne v. Fisk*, 127 Mass., 125; *Chapman v. Union Mut. Life Ins. Co.*, 4 Ill. App., 29; *Moody v. Aiken*, 50 Tex., 65; *Kennard v. Brough*, 64 Ind., 23; *Ottumwa Woolen Mills Co. v. Hawley*, 44 Iowa, 57; *McConnell v. Blood*, 123 Mass., 47; *Central Branch R. R. Co. v. Fritz*, 20

Money.—The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale; except that where it consists of gold coin, he must sell it, like other personal property, unless he is otherwise directed by an order of the judge, or by the judgment in the particular cause.¹ The money, however, must not only belong to the judgment debtor, but it must be within his control. So, money collected upon an execution, and in the hands of the officer collecting it, cannot be levied upon, on an execution against the person for whom it was collected; because the indential pieces of money collected, are not necessarily to be paid over to him. The money is not strictly his till actually paid over. Until that be done, his right is a chose in action.² The same may be said of money deposited in a bank;³ or of moneys collected by an attorney for the judgment debtor.⁴ But money deposited with the clerk of a court, in lieu of an undertaking, *it seems*, is liable to be levied upon, on an execution against the depositor. The ultimate title remains in him, subject to the claim of the respondent on appeal.⁵ And after a sale of the judgment debtor's goods on an execution, the surplus in the officer's hands, remaining after satisfying the execution, is moneys which belong to the judgment debtor, and may be levied on under subsequent executions against him.⁶

Certain Evidences of Debt.—The officer, to whom an execution against property is delivered, must levy upon and sell a bill, or other evidence of debt, belonging to the judgment debtor, which was issued by a moneyed corporation to circulate as money; or a bond, or other instrument for the payment of money, belonging to the judgment debtor,

Kan., 430; Hutchins v. Masterson, 46 Tex., 551; Cochran v. Flint, 57 N. H., 514; Robinson v. Wright, 2 MacArthur, 54.

¹ Code Civ. Pro., § 1410.

² Dubois v. Dubois, 6 Cowen, 494; Baker v. Kenworthy, 41 N. Y., 215; Carroll v. Cone, 40 Barb., 220; Muscott v. Woodworth, 14 How., 477; Turner v. Tendall, 1 Cranch (U. S.), 116.

³ Carroll v. Cone, 40 Barb., 220.

⁴ Maxwell v. McGee, 12 Cush. (Mass.), 137.

⁵ Dunlop v. Patterson F. Ins. Co., 74 N. Y., 145; see Code Civ. Pro., § 1412.

⁶ Wheeler v. Smith, 11 Barb., 345.

which was executed and issued by a government, State, county, public officer or municipal or other corporation, and is in terms negotiable, or payable to the bearer or holder.¹ Such evidences of debt have come to be regarded as "goods and chattels," rather than choses in action.²

What are Choses in Action.—A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, is a chose in action.³ Such are promissory notes,⁴ accounts, bank and library shares,⁵ bonds, judgments,⁶ or other sort of debts due the judgment debtor, except as the Code provides as above. The interest of a special partner in the partnership concern, is a mere chose in action, and cannot be levied upon.⁷

Interest in Goods Pledged.—The interest of the judgment debtor in personal property subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions, upon which the judgment debtor could obtain possession thereof. This section does not apply to property, of which the judgment debtor is unconditionally entitled to the possession.⁸

Leviable Interest Short of Ownership.—Any "goods and chattels" in the possession of the judgment debtor, to the possession of which he is entitled, and in which he has any assignable interest, is subject to be levied upon, and the interest of the debtor may be sold on execution against him.⁹ So the interest of bailees or pledgees for security, in goods

¹ Code Civ. Pro., § 1411.

² Edwards on Bills and Notes (3d ed.), § 895.

³ Bouv. Law Dic.

⁴ *Ingalls v. Lord*, 1 Cow., 240; *Ransom v. Miner*, 3 Sandf., 692; *Field v. Lawson*, 5 Ark., 376; *Greenwood Exr. v. Spiller*, 2 Scam. (Ill.), 504; *Hillman v. Moore*, 3 Tenn. Ch., 454.

⁵ *Denton v. Livingston*, 9 Johns., 96.

⁶ *Wilson v. Matheson*, 17 Fla., 630.

⁷ *Harris v. Murray*, 28 N. Y., 574; see *Hillman v. Moore*, 3 Tenn. Ch., 454.

⁸ Code Civ. Pro., § 1412.

⁹ *Weaver v. Darby*, 42 Barb., 411.

in their possession, may be taken and sold on execution against them.¹ So, too, chattels which have been mortgaged may, notwithstanding, be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure is entitled to the possession, for a definite period, against the mortgagee.² The officer making the seizure and sale under the execution is not liable to the mortgagee, although he sell the property generally without in any way, recognizing the lien of the mortgage, and deliver possession of it to the purchaser. No right of the mortgagee is interfered with. All the officer *can* sell is the interest of the execution debtor in the property.³ The purchaser acquires the right to the possession of the goods for the prescribed period, and the right to redeem and nothing more.⁴ If, however, there is no right of possession for any period, reserved to the mortgagor, or if he be in possession after default, he has no leviable interest in the goods; the mere right of redemption being a chose in action.⁵ And when the mortgagee, in good faith, takes possession of the bulk of the property, under a clause in the instrument authorizing him to do so whenever he deems himself unsafe, the possessory right of the mortgagor terminates, and he has no remaining interest in any part of the mortgaged property, subject to levy and sale on execution.⁶ After default, though the mortgagee has not taken possession, a levy on the mortgaged chattels as the property of the mortgagee is good.⁷

The lessee of goods and chattels for a term, has an inter-

¹ *Saul v. Kruger*, 9 How. Pr., 569.

² *Hull v. Carnley*, 11 N. Y., 501; S. C., 17 id., 202; *Bailey v. Burton*, 8 Wend., 339.

³ *Hull v. Carnley*, *supra*; *Manning v. Monaghan*, 28 N. Y., 585.

⁴ *Bank of Lansingburgh v. Crary*, 1 Barb., 542; *Marsh v. Lawrence*, 4 Cow., 461.

⁵ *Mattison v. Baucus*, 1 N. Y., 295; *Hall v. Tuttle*, 8 Wend., 375; *Champlin v. Johnson*, 39 Barb., 606; *Howland v. Willett*, 3 Sandf., 607; *Stewart v. Slater*, 6 Duer, 83, 96; *Farmers' Bank v. Cowan*, 2 Abb. Ct. App. Dec., 88; S. C., 2 Keyes, 217; *Baltes v. Ripp*, 1 Abb. Ct. App. Dec., 78; S. C., 3 Keyes, 210.

⁶ *Hall v. Sampson*, 35 N. Y., 274.

⁷ *Ferguson v. Lee*, 9 Wend., 258; *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370.

est which is the subject of a sale on execution.¹ But where it is a condition in a lease of personal property, that the lessee shall keep it upon particular premises, and not remove it therefrom, a *removal* of such property by the lessee operates as a forfeiture of the term, and divests his title so that no interest, in the property removed, remains in him that can be sold by execution.² And where a chattel is hired for a term, for a particular use only, and the hirer is prohibited by the instrument of hiring from using it in any other way, and from selling or loaning it, he has no leviable interest in it.³ An agent holding goods for sale on commission, he to account for them at invoice prices, and retain the whole amount realized above that price, and to pay all the expenses of the business, has no leviable interest in them.⁴ A fraudulent purchaser of goods acquires no title as against the vendor, and has no interest which can be seized on execution.⁵ And where a sale is void for any reason, although possession of the goods has been given to the vendee, yet are the goods subject to be levied upon on an execution against the vendor.

Goods and chattels, to the possession of which the owner is not entitled during a certain term, or until the happening of a certain event, cannot be seized upon execution against the owner, until the term has expired, or the event has happened.⁶ So, where a sheriff has made a *valid* levy, under an execution, and taken the property into his possession, a constable, to whom executions against the same defendant are subsequently issued by a justice of the peace, cannot make any levy on such property, nor can he sell the same subject to the levy made by the sheriff.⁷ So, where a mechanic has performed labor upon a chattel of another, it cannot be taken from his possession against his will on an

¹ Van Antwerp v. Newman, 2 Cow., 543; Gordon v. Harper, 7 T. R., 11; Manning's Case, 8 Co. 191; Hurd v. West, 7 Cow., 752.

² Otis v. Wood, 3 Wend., 499.

³ Reinmiller v. Skidmore, 7 Lans., 161.

⁴ Benz v. Geissell, 24 Minn., 169.

⁵ Root v. French, 13 Wend., 570.

⁶ Acker v. White, 25 Wend., 614; Burkle v. Luce, 1 N. Y., 163; Hartford v. Jackson, 11 N. H., 145; Goodheart v. Bowen, 2 Ill. App., 578; Moore v. Hitchcock, 4 Wend., 292.

⁷ Seymour v. Newton, 17 Hun, 30; Hagon v. Lucas, 10 Peters (U. S.), 400.

execution against that other, until he is paid for his labor.' It may be remarked here that in common law, and by custom, liens are recognized in favor of mechanics, manufacturers, tradesmen, attorneys, bankers, brokers, calico printers, packers and wharfingers, factors and fullers and persons of other trades and occupations, for work performed or expense incurred. The lien continues so long as the chattel upon which (by work or service performed, or expense incurred), the lien is created, remains in the possession of the party who claims the lien. As such lien is intended for the convenience of trade only, it does not apply where the labor performed, or expense incurred, upon the chattel, are not within the scope of some particular branch of commerce or trade; and it does not continue after the party claiming it has once voluntarily parted with the possession of the article. Liens also exist by statute, and they may be created to any extent by the agreement of the parties. Where the sheriff desires to levy upon chattels of a judgment debtor, not in the possession of the owner, he must ascertain if the party having the immediate possession rightfully enjoys it, because of a lien upon the chattels, or by special arrangement with the owner. If he finds that *for any reason* the owner is not entitled to immediately possess them, he should not make the levy.

Partnership Property.—The interest of one partner in the partnership property may be taken and sold under an execution at law, on a judgment against him for his separate debt.¹ And the sheriff may seize the entire partnership effects, or so much thereof as may be necessary to satisfy the execution, and sell the *interest of the partner*, against whom the execution is issued, and deliver the property to the purchaser.² Where he levies by virtue of such an execution, upon the interest of the judgment debtor in the goods of the firm, and within the sixty days and before a sale, he receives an execution against all the members of

¹ Moore v. Hitchcock, 4 Wend., 293; Truslow v. Putman, 1 Keyes, 568.

² Moody v. Payne, 2 Johns Ch., 548; Smith v. Orser, 42 N. Y., 132; Ross v. Henderson, 77 N. C., 170; Benton v. Baile, 50 Vt., 137; De Forest v. Miller, 42 Tex., 34; Vandike v. Roskam, 67 Penn. St., 330.

³ Phillips v. Cook, 24 Wend., 389; Schrugham v. Carter, 12 Wend., 131; Atwood v. Impson, 20 N. J. Eq., 150.

the firm for a copartnership debt, the latter is the prior lien, and if upon sale the goods prove insufficient to satisfy it, he is justified in returning the former execution *nulla bona*.¹ Had there been a sale under the first execution, before the receipt of the latter, the former would have taken precedence.² The same rule applies as to other joint debtors or tenants in common.

Partnership Property, how Released.—Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them, may, at any time before the sale, apply to a judge of the court, or to the county judge of the county, where the seizure was made, upon an affidavit, showing the facts, for an order, directing the officer to release the property, and to deliver it to the applicant.³

“Upon such an application, the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect that he will account to the purchaser, upon the sale to be made by virtue of the execution, of the interest of the judgment debtor in the property seized, in like manner as he would be bound to account to an assignee of such an interest; and that he will pay to the purchaser the balance, which may be found due upon the accounting, not exceeding a sum specified in the undertaking, which must be not less than the value of the interest of the judgment debtor, in the property seized by the sheriff, as fixed by the judge. The provisions of sections 695 and 696 of this act apply to the proceedings, taken as prescribed in this and the last section.”⁴

Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections 693 and 694 of

¹ Eighth Nat. Bank v. Fitch, 49 N. Y., 539; Ryder v. Gilbert, 16 Hun, 163; Menagh v. Whitwell, 52 N. Y., 146; Fenton v. Folger, 21 Wend., 676.

² Fenton v. Folger, *supra*.

³ Code Civ. Pro., § 1413; see Richards v. Haines, 30 Iowa, 514.

⁴ Code Civ. Pro., § 1414.

of this act, a levy, by virtue of an execution against his individual property, cannot be made upon his interest in the same property, unless the warrant of attachment has been vacated, or annulled.”¹

“Where personal property of a partnership has been released, upon giving an undertaking, as prescribed in the last three sections, if the execution, by virtue of which the levy was made, is set aside, or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment creditor of the same judgment debtor, then having an execution in the hands of the same officer, or of another officer, having authority to levy upon that interest, as if it had been given to obtain a release from a seizure, made by virtue of such an execution.”²

“Where personal property of a partnership has been so released, the interest of the judgment debtor therein may be sold by the officer; and the purchaser, upon the sale, acquires all that interest, as if he was an assignee thereof. If the purchase-money exceeds the amount of all the executions and warrants of attachment, against the property of the same judgment debtor, of which the officer has notice, and of the lawful fees and charges thereon, the officer must pay the surplus into court, for the benefit of the judgment debtor, or other person entitled thereto.”³

When a sheriff levies upon a growing crop owned by the judgment debtor and another, he is constructively in possession of the whole, so that when the debtor afterwards and before the return of the execution acquires his co-tenants share, the sheriff may rightfully sell the whole upon his original levy.⁴

7. Order of Preference Among Executions, etc.

Where two or more executions against property are issued out of the same or different courts of record against the same judgment debtor, the one first delivered, to an officer, to be executed, has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently

¹ Code Civ. Pro., § 1415.

² Code Civ. Pro., § 1416.

³ Code Civ. Pro., § 1417.

⁴ Ray v. Birdseye, 5 Denio, 619; aff'g S. C., 4 Hill, 158.

delivered ; but if a levy upon and sale of personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the latter.¹

But it would seem that in making a disposition of the proceeds on such sale, the sheriff must be governed by the priority in the delivery of the execution to him, unless such prior execution have, for some reason, become dormant as to the subsequent one.²

Where an execution is issued upon a judgment before it is docketed in the county to which the execution is issued, the latter takes priority from the time of the docketing.³

Where there are one or more executions, and one or more warrants of attachment, against the property of the same person, the rule prescribed in section 1406 of the Code prevails, in determining the preferences of the executions or warrants of attachment ; the defendant in the warrants of attachment being, for that purpose, regarded as a judgment debtor.*

But an execution, issued out of a court not of record, or a warrant of attachment, granted in an action pending in a court not of record, if actually levied, has preference over another execution, issued out of any court, of record or not of record, which has not been previously levied.*

The title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered before the purchase was made, to an officer, to be executed.* And the law will not presume that the sheriff made a levy under an execution in his hands previous to the sale, so as to defeat the title of the purchaser.⁷ The *onus*, however, is on the vendee, to

¹ Code Civ. Pro., § 1406; *Goodheart v. Bowen*, 2 Ill. App., 578; *Re Tills*, 11 Bank Reg., 214.

² *Peck v. Tiffany*, 2 N. Y., 451; *Kennon v. Ficklin*, 6 B. Monr. (Ky.), 415; *Lambert v. Paulding*, 18 Johns., 311.

³ *Stoutenburgh v. Vandenburg*, 7 How. Pr., 229.

⁴ Code Civ. Pro., § 1407.

⁵ Code Civ. Pro., § 1408.

⁶ Code Civ. Pro., § 1409.

⁷ *Millspaugh v. Mitchell*, 8 Barb., 333.

show himself to be a purchaser in good faith.¹ To be a *bona fide* purchaser, within the meaning of the Code, some new value must be parted with, or some new liability assumed. One to whom property is assigned in payment of a pre-existing debt, is not such a *bona fide* purchaser.²

8. *The Levy.*

Powers and Duties of Sheriff as to Levy.—To levy an execution means to raise money upon it. This is a duty frequently devolving upon the sheriff; and in its performance, if he be not possessed of a good share of common sense and discretion, and have not a fair knowledge of his own powers and of the rights of others, he will raise more trouble for himself than money for the creditor. When he receives an execution he is bound to follow its directions in every particular, if possible.³ Hence he must make inquiry for property of the debtor within his county. If he find any, *not clearly exempt*, in the debtor's possession, in which the latter has an interest, he is bound to seize it; otherwise *he must show* that it was not liable to be levied upon against the debtor.⁴ If he make the levy and the debtor do not own the property, or have an interest in it, and be entitled to its immediate possession, he is liable to some third party for an unwarranted interference with it.⁵ If the property be subject to the levy, the latter must be good and valid against the debtor, *bona fide* purchasers, and any others acquiring subsequent rights; otherwise, if through his own negligence or mistake, the creditor is prejudiced, the sheriff is liable to him for the damages sustained. If property be found, the sheriff must not wilfully make an excessive levy; yet he must see to it that he seizes sufficient property, in the first instance, if there be sufficient to satisfy the execution, including interest and his own fees and costs, taking into account the probable sacrifice in subjecting the property to

¹ Williams v. Shelly, 37 N. Y., 375.

² Ray v. Birdseye, 5 Denio, 619; aff'g S. C., 4 Hill, 158; Warren v. Paine, 3 Barb. Ch., 630; Slade v. Van Vechten, 11 Paige, 21.

³ Code Civ. Pro., § 102.

⁴ Camp v. Chamberlain, 5 Denio, 198; Williams v. Lowndes, 1 Hall, 579; Kaster v. Pease, 42 Iowa, 488; Wheeler v. Harrison, 57 Ga., 24.

⁵ Stephens v. Lamson, 7 Blackf. (Ind.), 275.

public sale. However, if the sheriff make diligent effort to find property of the judgment debtor and fail, he is not liable, though the debtor have sufficient property to satisfy the execution. Ordinarily the goods and chattels of a judgment debtor, unless incumbered to the extent of their value, should be levied upon and sold first, before any proceedings to sell his real estate.¹ Where the execution is upon a judgment rendered by a justice of the peace, though docketed so as to become a county court judgment, if the recovery exclusive of costs be less than twenty-five dollars, the real estate of the debtor cannot be sold thereon in any event.² The levy should be made soon after the execution is received, so that, before the return day, the debtor's real property may be duly sold, if his goods and chattels are insufficient to satisfy the execution. Where there are several judgment creditors, and the sheriff knows, beyond a doubt, either by the fact appearing upon the face of the execution, or otherwise, that one of them is principal and the others are sureties as to the debt upon which the judgment is rendered, he should levy upon and sell the property of the principal first; as that, in equity, is primarily liable; where, however, the question of primary liability is in any wise doubtful, he is not called upon to discriminate, unless expressly ordered so to do by the court.³

If the property of the judgment debtor is in his own dwelling house, the sheriff cannot lawfully break the outer door, or even lift its latch, and enter against the will of the debtor to make the levy.⁴ The same rule applies here as in arrests in civil cases. If the door be open he may enter and seize the goods; or if the goods are in the house of a third party, the sheriff may demand their delivery, and if it be denied him, he may then break and enter the house, and take the goods. Once lawfully within the house, be it the dwelling of the defendant, or otherwise, he may and must

¹ Code Civ. Pro., § 1369.

² Code Civ. Pro., § 3017.

³ *Boughton v. Bank of New Orleans*, 2 Barb. Ch., 458.

⁴ *Curtis v. Hubbard*, 1 Hill, 336; S. C., 4 id., 437; *People v. Hubbard*, 24 Wend., 369; *Glover v. Whittenhall*, 6 Hill, 597; *Keith v. Johnson*, 1 Dana (Ky.), 605; *Boggs v. Van Dyke*, 3 Harr. (Del.), 288; *Closson v. Morris*, 47 N. H., 482.

when necessary, break open inner doors, trunks, boxes, etc., to find the goods and levy upon them.¹ After demanding admittance to any building, other than the dwelling house of the judgment debtor, the sheriff may break and enter the building and there take the debtor's goods.² When various tenants hire rooms in a house from a landlord, who dwells in the house, the common street door is the outer door for all the tenants; and after a sheriff has obtained lawful entrance through this, he may break open the door of the rooms occupied by one tenant, to levy an execution on goods within.³

What Constitutes a Levy.—To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession of them, if that be practicable; if not, then he must openly and unequivocally assert his title to them by virtue of his executions.⁴ It is proper but not necessary that the sheriff should make an inventory of the property.⁵ It is not essential to the validity of the levy that he take *actual* possession of the goods, or that he remove them from the custody of the debtor.⁶ The test of a valid levy is, whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution.⁷ So, where a deputy sheriff, having an execution against a lawyer, went to his office, and, not finding him in, looked over his library, opened the cases, handled the books and made a memorandum of them in writing, commencing: "I have levied on the within described property," etc., and, soon after, meeting the debtor, showed him the execution,

¹ Haggerty v. Wilber, 16 Johns., 287; Lee v. Gansel, Cowp., 1; Hutchinson v. Birch, 4 Tannt., 619, 625.

² Haggerty v. Wilber, 16 Johns., 287.

³ Cantrell v. Connor, 6 Daly, 39.

⁴ Roth v. Wells, 29 N. Y., 471, 485; Haggerty v. Wilber, 16 Johns., 287; Beekman v. Lansing, 3 Wend., 446; Westervelt v. Pinckney, 14 id., 123; Green v. Burke, 23 id., 490; Camp v. Chamberlain, 5 Denio, 198; Gordon v. Gilfoil, 27 La. Ann., 265; Bond v. Willett, 1 Abb. App. Dec., 165.

⁵ Roth v. Wells, 29 N. Y., 485.

⁶ Barker v. Binninger, 14 N. Y., 270; Ray v. Harcourt, 19 Wend., 495; Van Wyck v. Pine, 2 Hill, 666; see Godfrey v. Brown, 86 Ill., 454; Memphis App. Pub. Co. v. Pike, 9 Heisk. (Tenn.), 697.

⁷ Roth v. Wells, *supra*; see Beekman v. Lansing, 3 Wend., 446; Green v. Burke, 23 id., 490; Camp v. Chamberlain, 5 Denio, 198; Elias v. Farley, 2 Abb. App. Dec., 11.

and asked him what he was going to do about it, and said he should have to levy on his books, and, immediately after, said he had already made a levy, it was held a sufficient levy as against a subsequent purchaser from the defendant.¹ So, too, it was held a valid levy where the sheriff, having received executions against a firm of merchants about noon, went to their store and exhibited them to one of the firm, made a levy upon the goods and informed that one of the firm of it, and after dinner delivered the executions to a deputy, directing him to enter the levy thereon, which the latter did the same day.² So, where the sheriff, in view of the debtor's goods, and in presence and with the knowledge of the debtor, and of a third person in whose possession the goods were, touched a part of them, saying, that he levied, and made a memorandum at the time on the execution, and afterwards told the creditor's attorney that he had levied on double enough to pay the judgment, *it was held* a sufficient levy as against the possessor, as well as against the debtor.³ So, too, it was held a sufficient levy where the officer having the execution, went to a field with the debtor, where the latter's colts were in view, and made a note of a levy on them on the execution.⁴

A levy upon the "right, title and interest" of the judgment debtor in goods, is in law equivalent to a levy upon the things, and is sufficient to sustain an action of replevin in the *cepit* by the owner.⁵ But the officer must take care to see that the execution properly describes the party whose property is sought to be taken; it is not enough that the right man is made to pay the debt. So, on an execution against *Freeman* Hildreth, he cannot levy upon the property of *Truman* Hildreth, although the latter may be the individual intended.⁶

If, after the sheriff has levied under one execution, another

¹ *Dean v. Campbell*, 19 Hun, 534.

² *Roth v. Wells*, 29 N. Y., 471; see *Richardson v. Rardin*, 88 Ill., 124; and see *Wehle v. Conner*, 83 N. Y., 231.

³ *Watts v. Cleaveland*, 3 E. D. Smith, 553.

⁴ *Greene v. Burke*, 23 Wend., 490; and see *Bond v. Willett*, 1 Abb. App. Dec., 165.

⁵ *Waid v. Gaylord*, 4 Thomp. & C., 41; S. C., 1 Hun, 607.

⁶ *Farnham v. Hildreth*, 32 Barb., §77.

or others come to his hands, while the levy continues, it suffices for all.¹ The mere receipt of the subsequent execution, either by the sheriff or by any of his deputies, operates as a constructive levy upon the property levied upon under the senior execution; even though after levy upon the senior execution, the latter has become dormant as against other creditors, by being delayed under the direction of the creditor in the senior execution.² Of course if there is an *invalid* levy under the senior execution, there can be no *valid* constructive levy under the junior ones.³ As where, on the senior execution, the sheriff, though with the debtor's express consent, levied upon growing trees, fruit or grass, before severance, such levy is void, and a valid constructive levy cannot be predicated upon it in favor of subsequent execution creditors, though the fruit, trees or grass be actually severed when the officer received the subsequent executions. Where two executions in favor of different creditors for different amounts, are placed simultaneously in the sheriff's hands, the proceeds of personal property levied upon under them, must be equally divided between the executions. After the smaller is satisfied, all the residue may be applied upon the larger.⁴

Where, under a senior execution, a levy upon the debtor's property has been made, an injunction in bankruptcy proceedings against the debtor will not prevent the lien of a subsequently received execution, attaching to the property held under the levy.⁵

What will not Constitute a Valid Levy.—To make a valid levy, the sheriff must have the goods within his view, and under his power. Merely seizing a few articles outside of a warehouse or store, and proclaiming a levy on the goods locked up in it, and not within his view, is not a valid levy; he ought, if necessary, to break open the building and

¹ *Cresson v. Stout*, 17 Johns., 116; *National Bank v. Babbitt*, 17 Hun, 447; *Eighth Nat. Bank v. Fitch*, 49 N. Y., 539; *Ryder v. Gilbert*, 16 Hun, 163; *Dean v. Campbell*, 19 id., 534.

² *Peck v. Tiffany*, 2 N. Y., 451; *Richards v. Allen*, 3 E. D. Smith, 399; *Van Winkle v. Udall*, 1 Hill, 559; *Slade v. Van Vechten*, 11 Paige, 21.

³ *Bank of Lansingburgh v. Crary*, 1 Barb., 542.

⁴ *Campbell v. Ruger*, 1 Cow., 215.

⁵ *National Bank v. Babbitt*, 17 Hun, 447.

actually bring the goods within his control.¹ And the mere fact that the goods were, during the life of the execution, within view of the officer and subject to his control, of itself is not sufficient, unless he at the same time asserts his title to them, by virtue of the execution.² So, merely looking at the goods and making a memorandum of a levy, is not, of itself, a levy.³ A levy will be void as against subsequent purchasers or execution creditors, where the levying creditor consents that the property be left with the debtor with permission to sell.⁴ The levy of an execution upon an unripe crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise and sell, as to evince an intention on the part of the judgment creditor, to hold the levy for a time merely as security.⁵

Dormant Execution.—After levy made, an execution cannot become dormant, except by such directions of the creditor, for delay, as will be presumed to be fraudulent. Mere delay or neglect of duty on the part of the sheriff without the express direction of the creditor, will not suffice to prefer subsequent execution creditors or purchasers in good faith.⁶ Where the evidence warrants the inference that the execution was issued not with an absolute intent to collect a debt, but partly, at least, to cover the property of the debtor, for his use, and it has not been enforced, it becomes dormant, and constructively fraudulent as against subsequently acquired rights. It can make no difference that the sheriff was instructed not to suffer the senior execution

¹ Haggerty v. Wilber, 16 Johns., 286; United States v. Graff, 67 Barb., 304; S. C., briefly noticed, 4 Hun, 634.

² Westervelt v. Pinckney, 14 Wend., 123; Beekman v. Lansing, 3 id., 446.

³ Van Wyck v. Pine, 2 Hill, 666; Camp v. Chamberlain, 5 Den., 198; Randall's Case, 5 City H. Rec., 141; Dresser v. Ainsworth, 9 Barb., 619; Techmeyer v. Waltz, 49 Iowa, 645.

⁴ Rew v. Barber, 3 Cow., 272; Russell v. Gibbs, 5 id., 390; Farrington v. Sinclair, 15 Johns., 428; Dickenson v. Cook, 17 id., 332; Wunderlich v. Roberts, 67 Ind., 421.

⁵ Burleigh v. Piper, 51 Iowa, 649.

⁶ Russell v. Gibbs, 5 Cow., 390; Benjamin v. Smith, 12 Wend., 404; Hickok v. Coates, 2 id., 419; Herkimer County Bank v. Brown, 6 Hill, 232.

to lose its preference.¹ Only another creditor or *bona fide* purchaser can object that an execution has become dormant.² As to real estate, an execution does not become dormant.³ Where the sheriff omits to make a levy under an execution during the sixty days, by direction of the creditor, he is not liable for a failure to collect.⁴

Payment of Execution by Sheriff.—"It is a well settled rule, sound in principle and in policy, that a sheriff cannot pay with his own money the judgment on which he holds an execution, and then levy and collect the amount from the debtor's property; nor will he be permitted, after he is in default for not collecting or returning an execution, to pay the amount and wield the process for his own indemnity."⁵ But where, during the life of an execution, the judgment whereon it issued is assigned to the sheriff, who pays full value therefor, and no levy is made under the execution, the sheriff may, *by express leave of court*, after his term has expired, issue another execution upon the judgment, and have it collected.⁶

Effect of Levy.—A levy upon the "goods and chattels of a debtor," places the "goods and chattels" in the custody of the law until a proper time for a sale, and for a reasonable time after the sale to allow the purchaser to remove them. During this time they may not be seized upon any other process, even for taxes, though they remain in the possession of the debtor. By the levy the officer obtains a special property in the goods; he may maintain an action against one taking them, whether from his immediate possession, or from the possession of the debtor or of a receiptor. The levy, however, never amounts to satisfaction of the exe-

¹ Kellogg v. Griffin, 17 Johns., 274; Ball v. Shell, 21 Wend., 222; Kimball v. Munger, 2 Hill, 364; Dunderdale v. Sanvestre, 13 Abb. Pr., 116; Price v. Shippo, 16 Barb., 585; Storm v. Woods, 11 Johns., 110; Power v. Van Buren, 7 Cow., 560; Gilmore v. Davis, 84 Ill., 487.

² Ferguson v. Lee, 9 Wend., 258.

³ Muir v. Leitch, 7 Barb., 341.

⁴ Smith v. Smith, 60 N. Y., 161.

⁵ Per Bockes, J., in Albany City Nat. Bank v. Kearney, 9 Hun, 535, citing Reed v. Pruyn, 7 Johns., 426; Bigelow v. Provost, 5 Hill, 566; Voorhees v. Gros, 3 How. Pr., 262; Carpenter v. Stilwell, 12 Barb., 128; S. C., 11 N. Y., 61; see Sherman v. Boyce, 15 Johns., 443.

⁶ Albany City Nat. Bank v. Kearney, 9 Hun, 535.

ution, though more than sufficient property has been levied upon.¹ There can be no satisfaction until the debtor has either paid his debt, or lost his property by reason of a sale under the levy, or of misconduct or negligence of the officer having made the levy.²

Execution Against Joint Debtors.—An execution upon a judgment against two or more defendants, all of whom were not summoned, must be issued in form against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff, containing the name of each defendant, who was not summoned, restricting the enforcement of the execution, so that the person and the sole property of the defendant or defendants, whose names are so indorsed, shall not be interfered with by the sheriff. Such execution, however, may be levied upon and collected out of personal property owned by such defendant, jointly with those who were summoned, or with any of them, and out of the real and personal property of those summoned, or of any of them.³ A levy, in opposition to these provisions of the Code, would be void.⁴

Custody of Property.—A sheriff, levying upon goods, must use due diligence to keep them safely, to satisfy the execution. But he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire. His capacity, as an officer, is not considered as fixing a more rigorous measure of liability upon him than if he were a private person.⁵ He is bound to exercise the same degree of diligence as a bailee for hire, and no more, so long as he has them actually in charge. He may, however, leave them with the debtor, or he may entrust them to a third person, and receive an undertaking for redelivery with or without surety, as he may think discreet and safe. He must judge, at his own peril, as to the responsibility of the par-

¹ *People v. Hopson*, 1 Denio, 574; *Ostrander v. Walter*, 2 Hill, 329; *Waddell v. Elmendorf*, 5 Denio, 447.

² *Peck v. Tiffany*, 2 N. Y., 451; *Wade v. Watt*, 41 Miss., 248; *Blackburn v. Jackson*, 26 Mo., 308; *State v. Myers*, 14 Ohio, 538.

³ Code Civ. Pro., §§ 1934, 1935.

⁴ *Sherry v. Schuyler*, 2 Hill, 204.

⁵ *Moore v. Westervelt*, 27 N. Y., 234; quoting *Edwards on Bailments*, p. 59; *Story on Bailments* (3d ed.), § 130.

ties to whom he may deliver them. If they prove insolvent, by which the property fails to be applied to the creditors' debt, or if the property be lost, destroyed or injured while so in their custody, except by the act of God, or the enemies of the country, it is the misfortune of the sheriff who consented to trust them, instead of keeping the goods in his own hands, or requiring better security.¹ The liability of the sheriff to the execution creditor is as broad as that of the receiptor to him, and the liability of the receiptor to the sheriff is absolute, and dischargeable only by act of God or the public enemy.² The receiptor, as to the custody of the goods, stands in the shoes of the sheriff, and he may hold the goods for his reasonable charges,³ and maintain an action for a wrongful interference with his possession of them.⁴ And he is estopped from setting up against the sheriff that the property was his own, or that of any person other than the execution debtor.⁵ The receipt need not set forth, in detail, or describe minutely and with particularity, the parties, court, and other facts appearing in full upon the execution, or describe everything in full and with technical accuracy.⁶

If, after levy, the sheriff at the request of the execution debtor leave the property in his possession, and he removes it out of the county, the sheriff may take the property *peaceably*, whenever he finds it within the State. Having so obtained it, though out of his county, he may rely on his levy, and defend his possession by necessary force.⁷

A sheriff cannot charge for the expense of labor in taking the property levied upon,⁸ nor for cartage of goods, nor for the services of an auctioneer,⁹ nor for any expense of prep-

¹ *People v. Reeder*, 25 N. Y., 302; *Browning v. Hanford*, 5 Denio, 586; S. C., 5 Hill, 588.

² *Cornell v. Dakin*, 38 N. Y., 253; see *Moore v. Fargo*, 112 Mass., 254; *Main v. Bell*, 27 Wis., 517.

³ *Aliger v. Keeler*, 8 Hun, 125.

⁴ *Dillenback v. Jerome*, 7 Cow., 294; *Mitchell v. Hinman*, 8 Wend., 667; *Miller v. Adsit*, 16 id., 335; *Butts v. Collins*, 13 id., 139.

⁵ *Cornell v. Dakin*, 38 N. Y., 253; *Burk v. Webb*, 32 Mich., 173.

⁶ *Burk v. Webb*, *supra*.

⁷ *Hill v. Haynes*, 54 N. Y., 153.

⁸ *Slater v. Haines*, 7 M. & W., 413.

⁹ *Rex v. Crackenthorp*, 2 Anstruther, 412.

aration for sale,¹ nor for expenses by reason of an adverse claim to the goods,² nor for an assistant or keeper,³ nor for indemnity against loss by fire, nor for storage.⁴ It is the duty of the sheriff, on receiving the writ, to proceed to levy upon the goods of the defendant. When the goods are taken, it is his duty to preserve them from loss from wrongdoers, or from the elements, or from accident. Whatever expense he is put to therein must come from his poundage and statutory fees.⁵

In making the levy the sheriff may stay upon the premises where the goods are found a reasonable time for the purpose, and for removing the goods, and no longer. But if the goods are left upon the defendant's premises, and in his custody, the officer may sell them there, and third persons may rightfully attend as bidders. When growing crops are levied on the officer may sell at once, or he may allow them to grow and become ripe and then sell them; and in either case, the officer or purchaser will have the right to take care of them, and to cut and carry them away, and he has a reasonable time in which to do it. The purchaser succeeds to all the rights of the defendant in respect to the crops, whether the defendant owns the land on which they grew, or occupies it as lessee.⁶

Relinquishing Levy.—A sheriff who levies upon goods under an execution, as the property of the defendant therein, may, when he discovers that the goods belong to another, relinquish the levy, and return his execution *nulla bona*. Thereby, however, the burden is thrown upon him to show that the defendant had no leviable interest in the goods, should the faith of his return be controverted.⁷ It does not alter the case to show that previously he had actually sold the same goods, under another execution against the same defendant.⁸ If the sheriff misconceive plaintiff's instructions, and

¹ Phillips v. Canterbury, 11 M. & W., 619; Halliwell v. Heywood, 10 W. R., 780, Exch.; Scarle v. Blaise, 14 C. B. (N. S.), 856.

² Davies v. Edmonds, 12 M. & W., 31.

³ Cooper v. Hill, 6 C. B. (N. S.), 703; Lord v. Richmond, 38 How. Pr., 173.

⁴ Crofut v. Brandt, 58 N. Y., 106.

⁵ Crofut v. Brandt, *supra*.

⁶ Crocker on Sheriffs (2d ed.), § 445, p. 202.

⁷ Blivin v. Bleakley, 23 How. Pr., 124; Lummis v. Kasson, 43 Barb., 373; see Redus v. State, 54 Miss., 712;

⁸ Blivin v. Bleakley, *supra*.

declare that he is authorized to relinquish the levy on payment of his fees, and they are paid, he is not precluded from enforcing his execution against the goods, though they are assigned to a third party, in payment of a pre-existing debt.¹ The officer's delay in taking possession of goods he has levied on, until an order staying proceedings is dissolved, is not an abandonment of the levy.² When a levy has been made before the commencement of proceedings in bankruptcy, the possession and legal title are in the officer making the levy, for the purpose of satisfying the process in his hands; and he has the right to go on and sell the property, being accountable for the surplus, if any, to the bankruptcy court or its assignee.³ If he relinquish the levy because of the proceedings, he is accountable to the execution creditor for the amount thereof.⁴

Effect of Appeal.—Where an appeal has been perfected, as prescribed in chapter twelve of the Code of Civil Procedure, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from; except that the court or judge, from whose determination the appeal is taken, may proceed in any matter, included in the action or special proceeding, and not affected by the judgment or order appealed from, or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court, from or in which the appeal is taken; or, if it was taken as prescribed in title fifth of said chapter, into the Supreme Court.⁵

Where an appeal, taken from a final judgment to the Court of Appeals, has been perfected, and the security, re-

¹ Colton v. Camp, 1 Wend., 365; and see Wright v. Young, 6 Oreg., 87.

² Bond v. Willett, 1 Abb. App. Dec., 165.

³ Bump on Bankruptcy [8th ed.], chap. 12, p. 206; Re Bernstein Nat. Bank Reg., sup., 43; Marshall v. Knox, 16 Wall., 551; S. C., 8 Nat. Bank Reg., 104; Smith v. Mason, 14 Wall., 419.

⁴ Ansonia Brass & Copper Co. v. Babbitt, 8 Hun, 157; Nat. Bank, etc., v. Babbitt, 17 Hun, 447.

⁵ Code Civ. Pro., § 1310.

quired to stay the execution of the judgment, has been given; or where the security, given upon an appeal, taken from a final judgment of the Supreme Court, a superior city court, a county court, or the marine court of the city of New York, is equal to that required to perfect an appeal to the Court of Appeals, and to stay the execution of the judgment; the court, in which the judgment appealed from was rendered, may, in its discretion, and upon such terms as justice requires, make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment.¹

If the appeal is taken from a judgment for a sum of money, or from a judgment or order, directing the payment of a sum of money, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect, that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum, recovered or directed to be paid, by the judgment or order, or the part thereof, as to which it is affirmed. But where the judgment or order directs the payment of money in fixed instalments, the undertaking must be to the effect that the appellant will pay each instalment which becomes payable, pending the appeal, or the part thereof as to which the judgment or order is affirmed, not exceeding a sum specified in the undertaking, which must be fixed by a judge of the court below. The court below may, at any time afterwards, upon satisfactory proof, by affidavit, that the sum so fixed is insufficient in amount, make an order, requiring the appellant to give a further undertaking, to the same effect, in a sum and within a time, specified in the order. A failure to comply with such an order has the same effect as if no undertaking had been given, as prescribed in section 1327 of the Code.²

If the appeal is taken from a judgment or order, directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or

¹ Code Civ. Pro., § 1311.

² Code Civ. Pro., § 1327.

order, until the thing directed to be assigned or delivered is brought into the court below, or placed in the custody of an officer or receiver, designated by that court; or the appellant gives a written undertaking as prescribed in section 1329 of the Code.¹

If the appeal is taken from a judgment for the recovery of a chattel, it does not stay the execution of the judgment, until the appellant gives a written undertaking, in a sum fixed by the court below, or a judge thereof, to the effect, that the appellant will obey the directions of the appellate court, upon the appeal.²

If the appeal is taken from a judgment or order, directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court.³

If the appeal is taken from a judgment, which entitles the respondent to the immediate possession of real property, or from a judgment or order, directing the sale or delivery of possession of real property, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and that, if the judgment or order is affirmed or the appeal is dismissed, he will pay the value of the use and occupation of the property, or the part thereof, as to which the judgment or order is affirmed, from the time of taking the appeal, until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum, fixed by a judge of the court below. But if the judgment directs a foreclosure and sale of real property mortgaged, an undertaking is sufficient to stay the execution of the judgment, which is to the effect that if the judgment is affirmed, or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, in discharging the sum to pay which the sale is directed, with interest, and the costs, and all expenses chargeable against

¹ Code Civ. Pro., § 1328.

³ Code Civ. Pro., § 1330.

² Code Civ. Pro., § 1329.

the proceeds of the sale, not exceeding a specified sum fixed by a judge of the court below.¹

The undertaking must be filed with the clerk, with whom the judgment or order appealed from is entered.²

Where the appellant is required, by chapter twelve of the Code, to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the judgment or order appealed from is entered, a sum of money, equal to the amount for which the undertaking is required to be given. The deposit has the same effect as filing the undertaking, and notice that it has been made has the same effect, as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.³

If, after execution upon the judgment is placed in the sheriff's hands, an appeal be taken and the security required filed, or the deposit made, the sheriff should proceed with the execution, until duly notified of the appeal and stay by the certificate of the clerk, which is usually made where an undertaking is filed by certifying a copy of the undertaking, and the indorsement of filing thereon. If, before the service upon him of such certificate, he have made the levy, the latter is not suspended or discharged, but the property levied on is still in the sheriff's control; and if he have left it with the execution debtor, he may, after notice of the stay as above, take actual possession of the property or take a receipt therefor.* If the sureties on the undertaking are excepted to and do not justify, the case will stand as if the undertaking had not been given.⁴

9. *Claim of Property by a Third Person.*

If personal property, levied upon as the property of the judgment debtor, is claimed by or in behalf of another per-

¹ Code Civ. Pro., § 1331.

² Code Civ. Pro., § 1307.

³ Code Civ. Pro., § 1306.

⁴ *Stricker v. Wakeman*, 13 Abb Pr. 85; *Smith v. Allen*, 2 E. D. Smith, 259; *Bond v. Willett*, 1 Abb. Ct. App. Dec., 165; S. C., 1 Keyes, 377.

* Code Civ. Pro., § 1335.

son, as his property, the officer may, in his discretion, empanel a jury to try the validity of the claim. If, by their inquisition, the jurors find that the property belongs to the claimant, they must also determine its value. Thereupon the officer may relinquish the levy, unless the judgment creditor gives him an undertaking, with at least two sufficient sureties, to the effect that the sureties will indemnify him, to an amount therein specified, not less than twice the value of the property, as determined by the jury, and \$250 in addition thereto, against all damages, costs and expenses, in an action to be brought against him by the claimant, his assignee, or other representative, by reason of the levy upon, detention, or sale of any of the property, by virtue of the execution. If the undertaking is given, the officer must detain the property, as belonging to the judgment debtor. If the property is found to belong to the defendant, the finding does not prejudice the right of the claimant to bring an action to recover the property so levied upon, or damages by reason of the levy, detention or sale.¹

Indemnitor, when Substituted in an Action Against Sheriff.—"Where an action to recover a chattel, hereafter levied upon by virtue of an execution, or a warrant of attachment, or to recover damages by reason of a levy upon, detention, or sale of personal property, hereafter made, by virtue of an execution, or a warrant of attachment, is brought against an officer, or against a person who acted by his command, or in his aid, if a bond or written undertaking, indemnifying the officer against the levy or other act, was given, in behalf of the judgment creditor, or the plaintiff in the warrant, before the action was commenced, the person or persons who gave it, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicants, as defendants in the action, in place of the officer, or of the person so acting by his command, or in his aid."²

¹ Code Civ. Pro., §§ 1418, 1419, 1420; see *Anthony v. Bartholow*, 69 Mo., 186; *Remdall v. Swackhamer*, 8 Oreg., 502; *Hayden v. Anderson*, 57 Ga., 378; *Storms v. Eaton*, 5 Neb., 453; *Whitney v. Moore*, 77 Penn. St., 479; *Mardis v. Johnson*, 43 Tex., 225. As to mode of conducting the trial of the claim, see Code Civ. Pro., §§ 108, 109; *ante*, p. 28.

² Code Civ. Pro., § 1421.

“Notice of the application must be given to the attorney for each party to the action. If the defendant has not appeared, notice must be given to him personally. If the pleadings do not sufficiently show that the case is one where the order may be granted, the facts, with respect thereto, must be shown by affidavit, or other competent proof. The motion papers must contain a written consent, to be made a defendant in the action, executed by each person who executed the instrument of indemnity, unless proof, by affidavit, is furnished that those who do not consent are dead. Each consent must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county.”¹

“Upon granting the order, the court may, in its discretion, require the applicants to furnish additional security to the plaintiff, and to pay the reasonable expenses of the defendant, necessarily incurred before the order is granted; or it may impose such other terms, for the security of either of the original parties, as justice requires.”²

“If the indemnity, given by the applicants, related to a part only of the property, the court may, in a proper case, direct that the action be divided into two actions; that the applicants be substituted as defendants in one without affecting the other; and that the controversy in each action be limited to that part of the property, in respect to which it is to be continued. Where such an order is made, a similar application may be subsequently made, in the action which proceeds against the original defendant.”³

“If the officer, or person acting by his command, or in his aid, is joined as a defendant, with all the persons entitled to make an application, they may apply for an order to strike out his name, as a defendant. If he is joined as a defendant, with one or more, but not all of them, those who are not made defendants, may apply to be substituted as defendants in his place. In either case, the application is made in the same manner, and is subject to the same provisions, as if it was made as prescribed in section 1421 of this act.”⁴

¹ Code Civ. Pro., § 1422.

² Code Civ. Pro., § 1423.

³ Code Civ. Pro., § 1424.

⁴ Code Civ. Pro., § 1425.

“An order, made as prescribed in the last five sections, does not affect the merits of the cause of action, or of the defense, except so far as it limits the controversy to particular property. But if the substituted or remaining defendants recover judgment, they are entitled to single costs only. If the action is discontinued, or the complaint dismissed, a new action may be brought, as if the former action had not been brought.”¹

“Where an action is brought, in a case where one or more persons are entitled to make an application, for an order of substitution, as prescribed in section 1421 of this act, the officer, to whom the instrument of indemnity was given, cannot maintain an action thereupon, against a person entitled to make, but who has not made, such an application; unless notice of the commencement of the action against the officer, or the person acting by his command, or in his aid, is given, before the trial thereof, or at least ten days before judgment by default is taken therein, either to the attorney whose name is subscribed to the execution or warrant of attachment, or, personally, to the judgment creditor, or to the plaintiff in the action in which the warrant of attachment was issued, or to one of the persons who executed the instrument of indemnity.”²

10. *Sale of Personal Property.*

Personal property must be offered for sale, in such lots and parcels, as are calculated to bring the highest price. Except where the officer is expressly authorized by the Code, to sell property not in his possession, personal property shall not be offered for sale, unless it is present, and within the view of those attending the sale.³

Notice.—At least six days' previous notice of the time and place of a sale of personal property, by virtue of an execution, must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city where the sale is made.⁴ The notice need not describe the execution, nor give the name of the judg-

¹ Code Civ. Pro., § 1426.

³ Code Civ. Pro., § 1428.

² Code Civ. Pro., § 1427.

⁴ Code Civ. Pro., § 1429.

ment debtor.¹ It should be signed by the sheriff or by the officer holding the execution in the name of the sheriff, and should apprise all persons of what kind and quantity of property was to be sold. In computing the time, the day on which the notice is posted should be excluded, and if the sixth day thereafter is Sunday, or a public holiday, it should also be excluded.²

A person who, before the time fixed for the sale, willfully takes down or defaces the notice, forfeits fifty dollars to the judgment creditor, and the same to the judgment debtor, unless the person seeking to enforce the forfeiture consented to the act, or the execution was previously satisfied.³ The object of the statute is to prevent any interference with the paper put up by the officer, and the contents thereof, which will defeat its purpose; that is, giving notice of sale. Hence, the statute will be violated, if one, finding a notice accidentally blown down after the officer had posted it, carry it away with the design to frustrate the officer's purpose.⁴ But an omission by the sheriff to post the notice, or the taking down or defacing it, when put up, does not affect the validity of the sale to a purchaser, in good faith, without notice of the fact.⁵ And this is so, though the judgment creditor is the purchaser, and he pays no money, but the amount of his bid is credited on the execution.⁶

Time.—The sale must be had between the hours of nine o'clock in the morning and sunset.⁷ A sale made before nine A. M. or after sunset is absolutely void.⁸ If the property cannot all be sold before sunset, it should be postponed until the next morning, or adjourned to some future day. An announcement at the close of the day's sale, of postponement until the next morning until nine A. M., will be sufficient. If an adjournment beyond that time is taken, notice thereof should be regularly posted. If the property

¹ *Chapman v. Morrill*, 19 Hun, 318; *Pollard v. King*, 63 Ill., 36.

² Code Civ. Pro., § 788.

³ Code Civ. Pro., § 1385.

⁴ *Murphy v. Tripp*, 44 Barb., 189.

⁵ Code Civ. Pro., § 1386.

⁶ *Wood v. Moorhouse*, 45 N. Y., 368.

⁷ Code Civ. Pro., § 1384.

⁸ *Wood v. Moorhouse*, 1 Lans., 405, 413; *Carnrick v. Myers*, 14 Barb., 9.

has been duly levied upon before the return day of the execution, it may be sold before or after the return day,¹ and even after the expiration of the sheriff's term of office.² And it has been held that a sale was valid, though the officer having returned the execution *nulla bona*, before the expiration of the sixty days, took it from the clerk's files with the latter's consent, erased the return, made a levy and sold thereunder.³ If the levy were had and the advertisement commenced in the life-time of the judgment debtor, a sale after his death is valid and effectual, to pass his right, title and interest in the property at the time of the levy.⁴

Adjournment.—"It is the duty of a sheriff, on receipt of an execution against property, to levy and sell, and have the money in court by the return day. When a levy is made, the officer is then secure, as it is in his power either to take the property levied on into his possession, or to require a receiptor. Although his precept requires him to have the money in court by the return day, yet the courts do not make it obligatory upon him so to do. He must levy before the return day, and he may sell afterwards. Consistently with the duties thus imperatively enjoined on the officer, he is permitted, nay required, to extend to the debtor such lenity as he may without injustice to the creditor. While he has the power to levy on the day the *fi. fa.* is delivered to him, and to sell at the expiration of six days therefrom; yet it would be treated as an exceedingly harsh proceeding, and the court would interpose between the debtor and the officer, in a proper case, and prevent him from oppressing the debtor. It is the right of the officer to postpone a sale from time to time, and for such a length of time as he may deem proper. But he may not, for his own gain, bind himself by a contract not to sell for such a period of time, as will prevent him from obeying the command of

¹ Jackson, *ex dem.* Cooper v. Browner, 7 Wend., 388; Adickes v. Lowry, 12 S. C., 97; Johnson v. Bemis, 7 Neb., 224; Willoughby v. Dewey, 63 Ill., 246; Wright v. Howell, 35 Iowa, 288; Savings Institution v. Chinn, 7 Bush (Ky.), 539.

² Code Civ. Pro., § 184, subd. 4, § 186.

³ James v. Gurley, 48 N. Y., 163.

⁴ Holman v. Holman, 66 Barb., 215; Wood v. Moorhouse, 1 Lans., 405; Strange v. Graham, 56 Ala., 614; Aycock v. Harrison, 65 N. C., 8; Bigelow v. Renker, 25 Ohio St., 543.

his process. He is bound, without compensation, to give every indulgence consistent with obedience to his process; and when he contracts for delay beyond what is consistent with his duty, he is contracting for compensation or indemnity for breach of it; and such a contract is unlawful and void."¹ "A postponement to be regular should be made at the time and place of sale. The object to be attained in allowing the postponement, is to prevent the sacrifice of the property, when the officer ascertains that a fair price cannot be obtained, by reason of the absence of bidders or other cause. Ordinarily this can only be ascertained at the time and place of sale."² Notice of the postponement should be given in manner like the original notices of sale were given. If the original notices are still up, a memorandum of the adjournment could be fastened to the bottom of them. If a postponement is made before the day of sale, a sale made upon the day designated in the original notice of sale, or in any prior notice of postponement, is irregular and void; and the notice of postponement must be treated as a new notice, and as an abandonment of the prior notices, and must of course be for six days, and in all other respects, as if it were an original notice.³ A sale commenced may be adjourned to a different place.⁴

Place.—Except where the officer is expressly authorized, by article two, title two, of chapter thirteen of the Code of Civil Procedure (section 1412, regarding the sale of the debtor's interest in pledged property), to sell property not in his possession, personal property shall not be offered for sale, unless it is present and within the view of those attending the sale.⁵ But an execution sale of a crop of corn, •

¹ Per Mullen, J., in *Perkins v. Proud*, 62 Barb., 420, 428; as to adjournment, see, also, *Tinkom v. Purdy*, 5 Johns., 345; *McDonald v. Neilson*, 2 Cow., 139; *Jackson v. Spink*, 59 Ill., 404; *Hall v. Ray*, 40 Vt., 576; *Russell v. Richards*, 11 Me., 371.

² Per Mullin, J., in *Frederick v. Wheelock*, 3 Supr. Ct. (T. & C.), 210.

³ *Frederick v. Wheelock*, *supra*; *Jackson v. Clark*, 7 Johns., 217.

⁴ *Tinkom v. Purdy*, 5 Johns., 345; *McDonald v. Neilson*, 2 Cow., 139; but see *Evarts v. Burgess*, 48 Vt., 205; *Fairbanks v. Benjamin*, 50 id., 99.

⁵ Code Civ. Pro., § 1428; see *Kennedy v. Clayton*, 29 Ark., 270; *Eads v. Stephens*, 63 Mo., 90; *Winfield v. Adams*, 34 Mich., 437; *Gaskell v. Aldrich*, 41 Ind., 338; *Grace v. Garnett*, 38 Tex., 156; *Tibbitts v. Jageman*, 58 Ill., 43; *Kennedy v. Clayton*, 29 Ark., 270.

three miles distant, with the assent of the debtor and all his creditors, was held to be valid; and an agreement by a junior execution creditor, bidding off the property to pay the amount of the claims of the senior creditors, if they would wait until he could sell the corn, to be binding on him.¹ If a part of the property is absent from the place, the sale is valid as to the property present.² The articles should be pointed out to the bidders, and sold specifically. If sold without any particular designation at the time of sale, the purchaser acquires no property in them.³ Thus, a sale of thirteen sheep of a flock, without designating the particular sheep, is void.⁴ But where the property was scattered about the farm, and the officer had pointed out what was to be sold, and sold it specifically, it was held valid.⁵

Manner.—The property must be sold at public auction,⁶ and in such lots and parcels as are calculated to bring the highest price.⁷ But a stranger has no right to object that the property was not sold in parcels.⁸ The sale should be conducted by the officer holding the execution. If he employ an auctioneer, it is at his own expense, and the auctioneer can only strike off the property to a bidder with the consent and approval of the officer. If the property be subject to a mortgage, it is proper to sell the whole together, so that the purchaser may acquire the equity of redemption.⁹ A sale of all the right, title and interest of the debtor in property mortgaged to defraud creditors, is a sale of all that is vendible on execution against him, and gives the purchaser all the creditor's rights as against the mortgagee.¹⁰ There can be no valid sale of the property on execution, except for cash, and the sale is not complete until the payment of the money bid.¹¹

¹ *Cook v. Timmons*, 67 Ill., 203.

² *Linnendoll v. Doe*, 14 Johns., 222.

³ *Sheldon v. Soper*, 14 Johns., 352; *Cresson v. Stout*, 17 Johns., 116.

⁴ *Warring v. Loomis*, 4 Barb., 484; *Mason v. White*, 11 Barb., 173.

⁵ *Tift v. Barton*, 4 Denio, 171; *Carpenter v. Simmons*, 28 How. Pr., 12.

⁶ Code Civ. Pro., § 1384.

⁷ Code Civ. Pro., § 1428.

⁸ *Stephens v. Baird*, 9 Cow., 274.

⁹ *Tift v. Barton*, 4 Denio, 171; *Harvey v. McAdams*, 32 Mich., 472.

¹⁰ *Porter v. Parmley*, 52 N. Y., 185.

¹¹ *Holmes v. Richmond*, 19 Hun, 634.

The sheriff should make an accurate memoranda of the sale of each article, specifying to whom sold, and the price paid for it. Thereby he is enabled, at any time, to render an exact account of the goods levied upon; and such memoranda is a sufficient writing to comply with the statute of frauds.

Bids and Bidders.—Any one but the sheriff and his deputy, making the sale, may bid upon property offered for sale upon an execution.¹ If the plaintiff become the purchaser, and there is no controversy as to whom is entitled to the proceeds, the amount of his bid, to the extent of the execution debt, may be applied upon the execution, and the surplus only is required to be paid in money.² In case of a dispute as to whom the proceeds should go, the sheriff should refuse to deliver the property to the plaintiff until he pays the money; and, if he refuses to pay, the sheriff should proceed to sell again.³ He may refuse the bid of an irresponsible party, as an infant.⁴ If the purchaser, whoever he be, refuse to take the property, and pay the bid, when the sale is complete, the officer may recover the amount of the bid in an action against the bidder, or he may re-sell the property at once and recover the difference, if any, between the bid and the second sale.⁵ If the officer elect to re-sell, he should do so at once, before the bidders have departed.⁶ The plaintiff in the execution, if he be a bidder, cannot be permitted to withdraw his bid without the consent of the debtor.⁷

Purchaser's Rights and Title.—A sale of personal property, under execution, passes only the right, title and interest of the judgment debtor in the property at the time the execution was placed in the hands of the sheriff for collection. Against bona fide purchasers or incumbrancers it

¹ Code Civ. Pro., § 1387; Jackson *ex dem.*, Scofield v. Collins, 3 Cow., 89; Jackson *ex dem.* Anderson v. Anderson, 4 Wend., 474; Mickles v. The Rochester City Bank, 11 Paige, 118.

² Nicolls v. Ketchum, 19 Johns., 84.

³ Russell v. Gibbs, 5 Cow., 390; Isler v. Colgrove, 75 N. C., 334.

⁴ Kinney v. Showdy, 1 Hill, 544.

⁵ Humphrey v. McGill, 54 Ga., 649; Williams v. Millington, 1 H. Black, 81; Armstrong v. Vrooman 11 Minn., 220; Hand v. Grant, 5 L. & M. (Miss.), 508.

⁶ Jones v. Null, 9 Neb., 254

⁷ Downard v. Crenshaw, 49 Iowa, 296.

can convey the debtor's right, title and interest only from the time of actual levy.¹ It matters not that the sheriff assumes to sell the goods absolutely. The manner of the sale cannot affect the rights of third parties. So, where goods, when execution issues, are duly mortgaged, all that can be sold under it are the debtor's right of possession for a definite period, and his equity of redemption.² If the debtor has no interest in the property sold, none passes by the sale to the purchaser.³ So, when goods were bought by the judgment debtor fraudulently, and subjected to sale under execution against him, no title can pass by the sale to any one, except a *bona fide* purchaser; an execution creditor cannot become such *bona fide* purchaser.⁴ There is no implied warranty of title by the sheriff, on a sale of property, under execution. If he sells, *in good faith*, without reason to doubt the title, he is not responsible to the purchaser for any defect therein.⁵ The purchaser acquires all the right and interest of the debtor in the property sold, and he has a reasonable time, after the sale, within which to remove them. If the property sold is growing crops, he has the right to harvest the crops, whether the lands upon which they grow are the debtor's or only leased by him.⁶ But where goods are capable of immediate complete delivery, and, after sale, they are left in the debtor's possession, a presumption of fraud arises, and if his good faith is questioned, the purchaser must prove it.⁷ But wherever the proceedings, *in invitum*, of the officer on a legal process, in substantial compliance with the law, unaided by any consent of the judgment debtor, by their legal force, operate to transfer the title of the property to the purchaser, the sale, though somewhat informal and defective, is a good sheriff's sale, and will protect the property to the purchaser

¹ *Snedeker v. Snedeker*, 18 Hun, 355.

² *Hull v. Carnley*, 11 N. Y., 501; *Bank of Lansingburgh v. Crary*, 1 Barb., 542; and see *Van Antwerp v. Newman*, 2 Cow., 543; *Fiero v. Betts*, 2 Barb., 633; *Hicks v. Skinner*, 71 N. C., 539.

³ *Catlin v. Jackson ex dem Gratz*, 8 Johns., 520; *Hoyt v. Van Alstyne*, 15 Barb., 568; *Chambers v. Lewis*, 16 Abb. Pr., 433; S. C., 28 N. Y., 454.

⁴ *Devoe v. Brandt*, 53 N. Y., 462.

⁵ *Harrison v. Shanks*, 13 Bush (Ky.), 620.

⁶ *Fuller v. Allen*, 16 How. Pr., 247.

⁷ *Masten v. Webb*, 19 Hun, 172.

without a change of possession.¹ A reversal of the judgment, or a setting of it aside, will not affect the title of a *bona fide* purchaser to goods sold under it.²

Paid Judgments.—When a judgment is satisfied there is no longer power to sell upon execution issued to collect it. Hence, if the sheriff is duly notified of the settlement and discharge of the judgment, he cannot sell for the purpose of collecting his fees.³ And if the execution debtor, even at the time of sale, offer or tender the amount of the execution and all ordinary fees thereon, the sheriff cannot go on with the sale, except at his peril.⁴ After such tender, the execution creditor cannot safely permit the sheriff to proceed with the sale, else he, too, will be liable as for a conversion of the property.⁵ After tender of the amount of execution and fees, and refusal, a sale to one, with notice, may be set aside.⁶

11. *Sale of Real Property.*

No Levy Necessary.—When the judgment is a lien upon the land, it is not necessary that the sheriff should make any formal levy or seizure before proceeding to advertise and sell. It would be an idle ceremony for him to go to the land, or to make any inventory of it, or do any other act of the like nature. The judgment binds the land which is already in the custody of the law before the execution issues. The execution comes as a power, to enable the creditor to reap the fruits of the seizure already made.⁷

Lien of the Judgment upon Real Estate.—A judgment required to be docketed as prescribed by the Code of Civil Procedure, neither affects real property or chattels real, nor is entitled to a preference until the judgment roll is filed and the judgment docketed.⁸

¹ Fitzpatrick v. Peabody, 51 Vt., 195; and see Woodworth v. Woodworth, 21 Barb., 343.

² Code Civ. Pro., §§ 1323, 1292, 445.

³ Jackson v. Caldwell, 1 Cow., 622; Wood v. Colvin, 2 Hill, 566; Craft v. Merrill, 14 N. Y., 456; Stilwell v. Carpenter, 59 id., 414; French v. Edwards, 5 Sawyer C. C., 966.

⁴ Tiffany v. St. John, 5 Lans., 153; Morse v. Gibbons, 43 Cal., 377.

⁵ Tiffany v. St. John, 5 Lans., 153.

⁶ Mason v. Sudam, 2 Johns. Ch., 172.

⁷ Wood v. Colvin, 5 Hill, 228, 230; Fitch v. Tyler, 34 Me., 463; see, too, Sullenger v. Buck, 22 Kan., 28, Van Gelder v. Van Gelder, 26 Hun, 356.

⁸ Code Civ. Pro., § 1250.

Except as otherwise specially prescribed by law, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in article three, chapter eleven of the Code of Civil Procedure, binds, and is a charge upon, for ten years after filing the judgment-roll, and no longer, the real property and chattles real, in that county, which the judgment debtor has, at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years.¹

When ten years after filing the judgment-roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as the heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee; specifying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as a notice of the pendency of an action. For that purpose, the judgment debtor, or his heir or devisee, named in the notice, is regarded as a party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned.²

The interest of a person, holding a contract for the purchase of real property, is not bound by the docketing of a judgment; and cannot be levied upon or sold, by virtue of an execution, issued upon a judgment.³

Where real property is sold and conveyed, and, at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or a part of the purchase-money, the lien of the mortgage, upon that real pro-

¹ Code Civ. Pro., § 1251.

² Code Civ. Pro., § 1252.

³ Code Civ. Pro., § 1253; 3 R. S. (7th ed.), 2201, § 4.

perty, is superior to the lien of a previous judgment against the purchaser.¹

“The time, during which a judgment creditor is stayed, by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing a judgment, is not a part of the ten years, to which the lien of a judgment is limited by this article. But this section does not extend the time of the lien, as against a purchaser, creditor, or mortgagee in good faith.”²

Where an appeal from a judgment has been perfected, and an undertaking has been given, sufficient to entitle the appellant to a stay of the execution of the judgment, without an order for that purpose, the court, in which the judgment was recovered, may, in its discretion and upon such terms as justice requires, make an order, upon notice to the attorney for the respondent, and to the sureties in the undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real, upon which the judgment is a lien, or a portion thereof, specifically described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment-roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket-book, substantially as follows: “Lien suspended upon appeal. See order entered;” adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry, substantially as follows: “Lien partially suspended upon appeal. See order entered;” adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket-book, as required by the order.”

“Where an order is made, as prescribed in the last section, by the Supreme Court or by a county court, it operates as a suspension of the lien upon property situated in the county, where the judgment-roll is filed, from the time when the order is entered, and the proper entry made in

¹ Code Civ. Pro., § 1254.

² Code Civ. Pro., § 1256.

³ Code Civ. Pro., § 1255.

the docket-book. If the property exempted is situated in another county, or if the order was made by a court, other than the Supreme Court or a county court, the order operates as the suspension, from the time, when the proper entry is made in the docket-book, kept by the clerk of that county, as prescribed in the next section.”¹

The clerk with whom the order is entered, must, upon payment of his fees therefor, furnish to the party who obtained the order, one or more transcripts, attested by his signature, of the docket of the judgment, including the entry made upon the docket. A county clerk, in whose office the judgment is docketed, must, upon payment of his fees therefor, immediately file such a transcript; and make an entry upon the docket of the judgment, in each place where it appears in his docket-book, substantially as follows: “Lien suspended,” or, “Lien partially suspended,” according to the entry upon the original docket, and also, “See transcript filed;” adding the proper date.²

“At any time after a judgment, which has ceased to be a lien, as prescribed in the last three sections, is affirmed, or the appeal therefrom is dismissed, the lien thereof may be restored, as follows:

1. The clerk, in whose office the judgment of affirmance, or the order dismissing the appeal, is entered, must, upon the request of the judgment creditor, docket the judgment anew, as it was originally docketed, but in the order of priority of the new docket; and he must write, upon the new docket, the words, “Lien restored by redocket;” adding the date of redocketing.

2. A transcript of the new docket must be furnished to a county clerk, in whose office an entry of the suspension of the lien has been made, as prescribed in the last two sections; and thereupon the judgment must be docketed by him anew, in the order of the priority of the new docket. The clerk who so redockets the judgment, must make an entry upon the new docket, substantially as follows: “Lien restored by redocket. See transcript filed;” adding the date of redocketing in his county.

The lien of the judgment is thereupon restored, for the

¹ Code Civ. Pro., § 1257.

² Code Civ. Pro., § 1258.

unexpired period thereof, as if the order had not been made; but with like effect only, as against judgment creditors, purchasers, and mortgagees in good faith, as if the judgment had then been first docketed.”¹

The provisions of article three of title one of chapter eleven of the Code of Civil Procedure, relative to the lien of judgment, apply only to a judgment wholly or partly for a sum of money, or directing the payment of a sum of money, and to an execution issued upon such a judgment.²

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.³

A judgment rendered in a creditor's action against an heir of the debtor, does not bind, and the execution thereupon cannot, in any way, effect the title of a purchaser in good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment roll filed.⁴

A judgment in an action against joint debtors, cannot, by virtue of its being docketed, bind any real property, or chattel real, owned individually by a defendant not summoned in the action.⁵

The expression “real property,” as used in the provisions of the Code, regulating the sale and redemption of real estate on execution, includes leasehold property where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereupon.⁶

Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an

¹ Code Civ. Pro., § 1259.

⁴ Code Civ. Pro., § 1853.

² Code Civ. Pro., § 1272.

⁵ Code Civ. Pro., § 1936.

³ Code Civ. Pro., § 1823.

⁶ Code Civ. Pro., § 1430.

estate vests in the beneficiary ; but special provision is not otherwise made by law, for the mode of subjecting it to his debts.¹

The judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt, or any part thereof.²

Where an execution against property is issued upon a judgment, specified in section 1432 of the Code, to the county where the mortgaged property is situated, the attorney, or other person who subscribes it, must indorse thereupon a direction to the sheriff, not to levy it upon the mortgaged property, or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page, where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied, as the case requires.³

Estates at will, or by sufferance, are chattel interests, but are not liable as such to sale on executions.⁴ Estates for life,⁵ as tenancy by the curtesy, are estates of freehold to which the lien of a judgment attaches.⁶ An estate, during the life of a third person, whether limited to heirs or otherwise, is deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.⁶

Notice of Sale.—The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale, as follows :

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places in the town or city where the sale is to take place, and also in three public places in the town or city where the property is situated, if the sale is to take place in another town or city.

¹ Code Civ. Pro., § 1431.

² Code Civ. Pro., § 1432.

³ Code Civ. Pro., § 1433.

⁴ 3 R. S. (5th ed.), 10, § 5; 2 id. (6th ed.), 1101, § 5; 3 id. (7th ed.), 2175, § 5.

⁵ Id.; Schermerhorn v. Miller, 2 Cow., 439.

⁶ 3 R. S. (5th ed.), 10, § 6; 2 id. (6th ed.), 1101, § 6; 3 id. (7th ed.), 2175, § 6.

2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, if there is one; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.¹

Where, after his term of office had expired, a sheriff proceeds to sell lands upon execution, the fact that some of the notices of sale were signed by the title of "sheriff" instead of "late sheriff," is a mere irregularity, and does not affect the validity of the sale.²

In each notice, the real property to be sold must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or by some other appropriate description. The validity of a sale is not affected by the fact that the property sold is part only of the property advertised to be sold.³

Penalty for Omitting Notice.—A sheriff who sells real property, by virtue of an execution, without having given such notice thereof, or otherwise than as prescribed in this chapter, forfeits \$1,000 to the party injured, in addition to the damages which the latter sustains thereby.⁴ The validity of the sale will not be affected by the omission to give notice.⁵

Where real property, offered for sale by virtue of an execution, consists of two or more known lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, of any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly. No more real property shall be exposed for sale, than it appears to be necessary to sell, in order to satisfy the execution.⁶ Should the sheriff sell more than what, in the ex-

¹ Code Civ. Pro., § 1434; See *Boyd v. McFarlin*, 58 Ga., 208; *Jouet v. Mortimer*, 29 La. Ann., 206; *Wilson v. Scott*, 29 Ohio St., 636; *Hagermman v. Ohio, etc., Assoc.*, 25 id., 186; *McCurdy v. Baker*, 1 Kan., 111.

² *Van Gelder v. Van Gelder*, 26 Hun, 356.

³ Code Civ. Pro., § 1435; see *Steward v. Pettigrew*, 28 Ark., 372; *Sawyer v. Wilson*, 61 Me., 529.

⁴ Code Civ. Pro., § 1436.

⁵ Code Civ. Pro., § 1386.

⁶ Code Civ. Pro., § 1437; See *Wellshear v. Kelly*, 69 Mo., 343; *Ridenour v.*

ercise of sound discretion, appears to be sufficient to satisfy the execution, unless there can be no separation into parcels, the sale will be set aside; if the sale appears to have been willfully made, the officer will be compelled to pay costs.¹ But an execution debtor cannot, at the time of sale, arbitrarily separate into distinct lots that land which had always been used and described as one parcel, and demand that the sheriff sell the lots separately.² Where the sheriff sells a parcel of land in which the execution debtors are tenants in common, he should sell separately the interest of each, if required so to do by the owner of such interest, or by a party entitled to redeem. If not expressly required so to do, the sheriff may sell, at once, the interest of all the debtors.³ It is the sheriff's duty, in regard to selling in parcels, to learn the situation of the property before he sells, and to sell in obedience to the direction of the statutes.⁴ The title papers of the debtor may determine the fact, whether the realty should be treated as one, or as several lots.⁵ The mode of occupancy may determine it.⁶ Different lots should be sold separately, although covered by a common incumbrance.⁷

“The sole purpose of an execution is to enforce judgment for just what is due, and no more. An execution and the sheriff are instrumentalities provided by law, by which a judgment creditor enforces his judgment; and the sheriff can give no better title or greater right by a sale on an execution than the judgment creditor could give, if he were allowed to seize property and sell by virtue of his judgment without an execution. If the judgment is void, or has been paid, the purchaser takes nothing. The rule of *caveat emptor* applies to every purchaser at a sheriff's sale, of

Shideler, 5 Ill. App., 180; Eggers v. Redwood, 50 Iowa, 289; Mays v. Wherry, 58 Tenn., 133; Browne v. Ferrea, 51 Cal., 552; Eaton v. Ryan, 5 Neb., 47; Bell v. Taylor, 14 Kan., 277.

¹ Tiernan v. Wilson, 6 Johns. Ch., 411; Cooke v. Walters, 2 Lea (Tenn.), 116.

² Van Gelder v. Van Gelder, 26 Hun, 356.

³ Neilson v. Neilson, 5 Barb., 565; Martin v. Hargardine, 46 Ill., 322; White v. Watts, 18 Iowa, 74; Tyler v. Wilkinson, 27 Ind., 450.

⁴ O'Donnell v. Lindsay, 39 N. Y. Supr. Ct., 523.

⁵ Ament v. Brennan, 1 Tenn. Ch., 431.

⁶ Woods v. Monell, 1 Johns. Ch., 502.

⁷ Baker v. Chester Gas Co., 73 Penn. St., 116.

either real or personal property, by virtue of an execution. He buys at his peril, and if by any valid agreement the judgment has lost its apparent position as a lien upon real estate, his lien under his purchase is just that which the judgment creditor had. It is true that these purchasers at sheriff's sales may sometimes be misled, but the courts have ample power, usually, in such cases, to relieve them."¹

Certificates of Sale.—The sheriff, who sells real property, by virtue of an execution, must make out, subscribe, and acknowledge, before an officer authorized to take the acknowledgment of a deed, duplicate certificates of the sale, containing:

1. The name of each purchaser, and the time when the sale was made.

2. A particular description of the property sold.

3. The price bid for each distinct parcel separately sold.

4. The whole consideration money paid.²

A sale of lands on execution is within the statute of frauds; and if no certificate or deed is given to the purchaser, and no memorandum of the sale is made by the auctioneer on striking off the property, the sale cannot be enforced, even though the purchase money is paid, and the sheriff makes a due return of the sale.³ A memorandum, made at the time of the sale, in a private sale book kept by the sheriff, and opposite a printed notice of the sale pasted therein, stating the name of the purchaser, and the amount for which the land sold, but which is not signed by the sheriff or his deputy, is not a sufficient memorandum to satisfy the statute.⁴

Filing and Delivering Certificates.—The sheriff must, within ten days after the sale, file one of the duplicate certificates, in the office of the clerk of the county, and deliver another to the purchaser. If there are two or more purchasers, a certificate must be delivered to each. The clerk must immediately record the certificate in a book, kept by

¹ Per Earl, J., in *Frost v. Yonkers Savings Bank*, 70 N. Y., 553, 560; and see *Treplow v. Buse*, 10 Kan., 170; *Morgan v. Bouse*, 53 Mo., 219; *Ball v. Pratt*, 36 Barb., 402.

² Code Civ. Pro., § 1438.

³ *Gossard v. Ferguson*, 54 Ind., 519.

⁴ *Ruckle v. Barbour*, 48 Ind., 274.

him for that purpose, and must index the record, to the name of the judgment debtor. His fees for so doing must be paid by the sheriff, as part of the expenses of the sale.¹

The Code provision is directory merely; the filing of the certificate is not a condition precedent to the giving of the deed and passing the title; the sheriff's omission to file it will not prejudice the purchaser.²

Proceeds and Surplus.—Though the sheriff sell under a particular execution, he may, at any time before the return of the process, apply the proceeds upon another execution, which he, subsequent to the sale, discovers to be prior to that under which the sale was made.³ Where a judgment, recovered by default against several defendants as partners, is opened by one only, and is set aside, and the complaint dismissed as to him, money collected under an execution issued on such judgment, by sale of partnership property, should not be paid to the plaintiff in such action, and a subsequent attaching creditor of the partnership is entitled to receive it.⁴ While surplus moneys remain in the sheriff's hands, they are subject to control of the court, and a junior judgment creditor may have an order for their payment on his execution.⁵

When Debtor's Title Divested.—The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period, within which it can be redeemed, and the execution of the sheriff's deed. But if the property is not redeemed, and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate, from the time of the sale. And if the title of such grantee or his assigns is adjudged, for any reason or cause whatsoever, to be null and void, in any action for that purpose brought by the judgment debtor

¹ Code Civ. Pro., § 1439.

² Jackson *ex dem.* Hooker v. Young, 5 Cow., 269; Taylor v. Gladwin, 40 Mich., 232; O'Brien v. Hashagen, 20 Hun, 564.

³ Peck v. Tiffany, 2 N. Y., 451; Thomas v. Kelsey, 30 Barb., 268.

⁴ Phillips v. Wheeler, 2 Hun, 603.

⁵ Van Nest v. Yeomans, 1 Wend., 87; Ball v. Ryers, 3 Caines, 84; S. C., Col. & C. Cas., 435; Averill v. Loucks, 6 Barb., 470, Mills v. Davis, 35 N. Y. Supr. Ct., 355; Nilson v. Kerr, 2 Thomp. & C., 299.

or his assigns, such judgment shall have no force or effect, unless, within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee, or his assigns, the sum of money which was paid upon the sale, with interest from the time of the sale, including the costs and expenses of said defendant in defeating the action in which said judgment was recovered, to be adjusted by a judge of the court in which said action is brought; and in the event of plaintiff's failure to pay such purchase money and expenses within the time aforesaid, said title shall be valid in said grantee. And in case such judgment has heretofore been recovered, and an appeal has been taken therefrom, which is now pending, and such judgment shall be affirmed on final appeal, the same shall have no force or effect, unless, within twenty days after the entry of judgment of affirmance, the plaintiff shall pay to such grantee or his assigns the sum of money which was paid upon the sale, with interest as aforesaid, including the costs and expenses of the defendant as aforesaid, in prosecuting any appeal from such judgment, and in the event of plaintiff's failure so to do, said title shall be valid in said grantee.¹

Rights of the Party in Possession of the Property during the Intermediate Period.—The person entitled to the possession of real property, sold by virtue of an execution, as prescribed in the section 1440 of the Code, may, during the period therein specified, use and enjoy the same as follows, without being chargeable with committing waste:

1. He may use and enjoy it in like manner, and for the like purposes, as it was used and enjoyed before the sale doing no permanent injury to the freehold.

2. He may make necessary repairs to a building, or other erection thereupon. But this subdivision does not permit an alteration in the form or structure of the building, or other erection.

3. He may use and improve the land in the ordinary course of husbandry; but he is not entitled to a crop growing thereon, at the expiration of the period of redemption.

4. He may apply any wood or timber on the land to the

¹ Code Civ. Pro., § 1440, as amended by Laws of 1881, chapter 681; see, too, *Jermon v. Lyon*, 81 Penn. St., 107; *Southworth v. Scofield*, 51 N. Y., 513.

necessary reparation of a fence, building or other erection, which was thereupon at the time of the sale.

5. If he actually occupies the land sold, he may take necessary fire-wood therefrom for use in his household.¹

Prevention of Waste.—If, at any time during the period allowed for redemption, the judgment debtor, or any other person in possession of the property sold, commits, or threatens to commit, or makes preparations for committing, waste thereupon, the Supreme Court, or any justice thereof, within the judicial district, or the county judge of the county, in which the property, or any part thereof, is situated, may, upon the application of the purchaser, or his assignee, or the agent or attorney of either, and proof by affidavit of the facts, grant without notice, an order restraining the wrong-doer from committing waste upon the property.²

If the person, against whom such an order is granted, commits waste in violation thereof, after the service upon him of the order, with a copy of the affidavit upon which it was granted, the court or judge, upon proof by affidavit of the facts, may grant an order, requiring him to show cause, at a time and place therein specified, why he should not be punished for a contempt.³

If, upon the return of the order to show cause, it satisfactorily appears that the person required to show cause, has violated the former order, the court or judge may either punish him, as prescribed by law for the punishment of a contempt of a court of record, other than a criminal contempt; or may grant a warrant, directed to the sheriff of the county, reciting the former order, and the violation thereof, and commanding the sheriff to commit the wrong-doer to close confinement, for a term specified therein, not more than one year. A person thus committed cannot be admitted to the liberties of the jail.⁴

The warrant may be superseded, and the prisoner discharged, by an order, in the discretion of the court or judge committing him, upon his executing to the person who applied for the warrant, an undertaking, in a sum fixed, and

¹ Code Civ. Pro., § 1441.

² Code Civ. Pro., § 1442.

³ Code Civ. Pro., § 1443.

⁴ Code Civ. Pro., § 1444.

with sureties approved by the court or judge, to the effect that he will pay any judgment, which the applicant, or his assignee, or other representative, may recover against him by reason of any waste theretofore or thereafter committed on the property; and upon his paying to the applicant, for the costs and expenses of the proceedings, a sum fixed by the court or judge.¹

Sale, when Void.—When either the judgment or the execution issued thereon is void, the sale thereunder is also void.²

12. *Redemption.*

When, and how Made.—Within one year after the sale of real property, by virtue of an execution, a person, specified in section 1447 of the Code, may redeem it, by paying to the purchaser, his executor, administrator or assignee, or to the sheriff who made the sale, for the use of the person so entitled thereto, the sum of money which was paid upon the sale, with interest from the time of the sale, at the rate of ten per centum a year.³

The day of sale is excluded in computing the time to redeem,⁴ and the last day must be included, except it be Sunday or a public holiday.⁵ When the last day is included, the year does not expire until midnight of the last day thereof;⁶ otherwise the redemption must be made before midnight of the day before the last day.⁷ The officer who sold the land may appoint an agent to compute and receive the amount required on redemption.⁸ But a redemption cannot be made by calling at the office of the county clerk—the same being the office of the sheriff—and paying the amount and presenting the papers to the clerk for the sheriff, neither the sheriff nor any of his deputies being present, and the

¹ Code Civ. Pro., § 1445.

² Woodcock v. Bennett, 1 Cow., 711; Jones v. Calloway, 56 Ala., 46; Jackson *ex dem.* Carman v. Rosevelt, 13 Johns., 97.

³ Code Civ. Pro., § 1446.

⁴ Code Civ. Pro., § 788; Snyder v. Warren, 2 Cow., 518.

⁵ Code Civ. Pro., § 788; People v. Sheriff of Broome, 19 Wend., 87; Roan v. Rohrer, 72 Ill., 583.

⁶ Exp. Bank of Monroe, 7 Hill, 177; Jessup v. Carey, 61 Ind., 584.

⁷ People v. Luther, 1 Wend., 42.

⁸ Hall v. Fisher, 9 Barb., 17; Same v. Same, 1 Barb. Ch., 53.

clerk having no special authority from the sheriff.¹ The sheriff may receive payment in good bank bills,² or by the transfer of property or securities, other than money, which the purchaser agrees to receive as money.³ Payment by check is not good unless the check is presented and paid before the time, within which the redemption may be made, expires.⁴ Foreign coin accepted at its current value by the sheriff, will suffice in redeeming, even though the *legal* value of the coin is not equal to its current value.⁵ In fact, a trivial deficiency in the payment will, in equity, be disregarded no matter how it may have occurred, without the willful act of one seeking to redeem.⁶ The deficiency must be trivial however, for the general rule is that a short payment will not constitute redemption, even though the mistake (unless it is willfully made) is caused by the wrong computation of the sheriff.⁷ One, who through mistake as to the sum required, fails to redeem, cannot acquire any right by paying the deficiency, after the expiration of the time for redemption.⁸

By Whom Made.—"The redemption, specified in the last section, may be made either by the judgment debtor, whose right and title were sold, or by his heir, devisee or grantee, who has acquired by inheritance, devise, deed, sale, by virtue of a mortgage or of an execution, or by any other means, an absolute title to the property proposed to be redeemed; or in a case specified in section 1458 or 1459 of this act, to a portion thereof."⁹

"The right of the judgment debtor, whose title has been sold on execution, to redeem from the sale, does not depend upon the condition of his title, at the time of the sale or redemption. The language of the statute" (Code) "is direct

¹ *People v. Rathbun*, 15 N. Y., 528; *Griffin v. Chase*, 23 Barb., 278.

² *Hall v. Fisher*, 9 Barb., 17; *Same v. Same*, 1 Barb. Ch., 53; see *Walker v. Brown*, 45 Miss., 615; *Sharp v. Miller*, 47 Cal., 82.

³ *Stone v. Smith*, 2 How. Pr., 117.

⁴ *People v. Baker*, 20 Wend., 602.

⁵ *Ex parte Becker*, 4 Hill, 613.

⁶ *Hall v. Fisher*, 9 Barb., 17.

⁷ *Dickenson v. Gilliland*, 1 Cow., 481; *ex parte Peru Iron Co.*, 7 id., 540; *ex parte Raymond*, 1 Denio, 272; but see *Karnes v. Lloyd*, 52 Ill., 113.

⁸ *Ex parte Raymond*, 1 Denio, 272.

⁹ Code Civ. Pro., § 1447; see *Robertson v. Dennis*, 20 Ill., 313.

and unambiguous. The right is given to the person, against whom the execution issued, and whose title was sold thereon. It follows the person and not the land, and continues for the period allowed by law, although the debtor meanwhile may have parted with his title. The right secured to the judgment debtor to redeem, although he has conveyed the land, is often an important and valuable one. Where he has conveyed with warranty, he is enabled thereby to protect the title of his grantee, and secure himself against liability, and if he has received a full consideration for the land, it is just and equitable that he should discharge it by redemption from the lien acquired by the purchaser on the sale, although he may not have bound himself by any covenant to do so. Nor is there any incongruity in holding that the right of redemption co-exists in the judgment debtor and his grantee. Where the former has conveyed the land, his redemption will inure to the benefit of the holder of the legal title, and the owner has the means of protecting his own interest, if the judgment debtor is either unable or unwilling to make the redemption.”¹ Trustees of an absent debtor, being vested with all his estate, are entitled to redeem.² But one who has acquired an equitable right, by redeeming under a sheriff's sale, but who has not received a deed, is not a grantee within the statute, and cannot redeem from a sale under an older judgment, from a stranger who had nothing to do with the delay of his deed.³ Where money is advanced by the execution debtor, for the purpose of having the sheriff's certificate of the sale of his lands upon the execution, assigned and thus kept on foot, does not operate as a redemption by him, and render the certificate null and void; on the contrary the sheriff, at the proper time, is bound to convey the property to the assignee, and if he refuses so to do, the court will compel him to convey. Money paid by a judgment debtor to a purchaser, for the purpose of redeeming is one thing, but money advanced to a third person, for the purpose of having the certificate as-

¹ Per Andrews, J., in *Livingston v. Arnoux* 56 N. Y., 507, 514; and see *Chatauqua Co. Bank v. Risley*, 19 id., 373; *Elsworth v. Muldoon*, 15 Abb. (N. S.), 440; *Yoakum v. Bower*, 51 Cal., 539.

² *Phyfe v. Riley*, 15 Wend., 248.

³ *Lathrop v. Ferguson*, 29 Wend., 116.

signed to such third person, is not the same, but quite another and different thing or transaction. The sheriff has no right to inquire who furnished the money by which the assignment was procured.¹ A mortgagee is not a grantee. He must redeem as a creditor.² The absence, on redeeming, of all but one of several joint owners, does not invalidate the redemption.³ The equitable owner of land must redeem in the same manner and within the same time as if he had the legal title.⁴

Effect of Payment and Redemption.—"Upon payment being made, by a person entitled to redeem real property, as prescribed in the last two sections, the sale of the property redeemed, and the certificates of the sale, as far as they relate thereto, become null and void."⁵

The effect of the redemption is to leave the legal title in the judgment debtor, or his grantee, free from any lien or incumbrance by reason of the sale, purchase and certificate.⁶ But if the judgment under which the property was sold, is not, by reason of the sale, entirely satisfied as to the unpaid portion, it remains a lien until the period for redemption has completely expired, and the sheriff has actually conveyed to the purchaser. And if, within the year, the judgment debtor, or his grantee, redeem, the land may again be sold upon the same execution to satisfy the unpaid balance of the judgments, even though the return day of the execution had passed.⁷ The certificate of sale is no more than a specific lien, entitling the holder to the amount of the bid and ten per cent interest, which, being paid and satisfied, the certificate becomes extinct. So, if the lands are sold on a prior mortgage, and the holder of the certificate claims and receives within the year, out of the surplus the amount of the bid and ten per cent, there is an effectual redemption by the judgment debtor, and the lien of a junior judgment,

¹ Rankin v. Arndt, 44 Barb., 251.

² Van Rensselaer v. Sheriff of Albany Co., 1 Cow., 501.

³ Beekman v. Bunn, Hill & D. Supp., 265.

⁴ Russell v. Allen, 10 Paige, 249.

⁵ Code Civ. Pro., § 1448; Phyfe v. Riley, 15 Wend., 248; Stafford v. Williams, 12 Barb., 240.

⁶ Boyce v. Wight, 2 Abb. N. Cas., 163.

⁷ Titus v. Lewis, 3 Barb., 70; Wood v. Colvin, 5 Hill, 228; but see Clayton v. Ellis, 59 Iowa, 590; Iowa Code, § 3103.

not reached in the application of the surplus of the mortgage sale, is restored.¹

When Creditor may Redeem.—"Real property, sold by virtue of an execution, which remains, at the expiration of one year after the sale, unredeemed by the person or persons entitled to redeem it, as prescribed in the last three sections, may be redeemed, within three months after the expiration of the year, by the creditors specified, and upon the terms and in the manner prescribed, in the following sections of this article."² Where the sale occurred on the 16th day of January, 1869, it was held that the fifteen months expired at midnight of the 16th day of April 1870.³

"In a case specified in the last section, a creditor, having in his own name, or as executor, administrator, assignee, trustee or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold, may redeem that property, by paying the sum of money which was paid upon the sale thereof, with interest at the rate of seven per centum a year from the time of the sale, and executing a certificate of satisfaction, as prescribed in section 1463 of this act."⁴

A sale under a judgment for less than its amount, and a deed to the purchaser, extinguishes all junior liens, either by judgment or mortgage, so that a junior incumbrancer cannot redeem from a subsequent sale under a senior judgment.⁵ A mortgage is satisfied by a sale of the mortgaged premises; hence, a judgment for the deficiency does not become a lien on the premises foreclosed, and the creditor cannot redeem thereunder, on a sale under a judgment which was a lien prior to that of the mortgage.⁶ A sale of land on execution, for more than the amount of the execution, extinguishes the lien of the judgment; and though the

¹ *Bodine v. Moore*, 18 N. Y., 347.

² Code Civ. Pro., § 1449; See Ala. Code, § 2881; *Posey v. Pressley*, 60 Ala., 243; *Durley v. Davis*, 69 Ill., 133.

³ *Morss v. Purvis*, 68 N. Y., 225.

⁴ Code Civ. Pro., § 1450.

⁵ *Ex parte Stevens*, 4 Cow., 133; *ex parte Elwood*, 1 Denio, 633; *Russell v. Allen*, 10 Paige, 249.

⁶ *People v. Beebe*, 1 Barb., 379. .

judgment creditor purchases, he cannot redeem by virtue of the judgment from a sale under a prior judgment.¹ So, a levy upon sufficient personal property extinguishes the judgment, and the creditor, by virtue thereof, cannot redeem land sold on other executions against the same debt.²

Where, by the lapse of ten years, the statutory lien of a judgment upon land has expired, a levy thereunder, as prescribed by section 1252 of the Code of Civil Procedure, upon land sold upon a junior judgment, gives the creditor the same right to redeem which he would have had, had his judgment been docketed, for the first time, at the time the levy was made.³ A judgment confessed for the express purpose of enabling to redeem, is sufficient, if it was on full consideration.⁴ So is a justice's judgment for more than twenty-five dollars, the transcript being duly filed.⁵ Any judgment creditor, may, after a sale, redeem, without reference to priority between his and other liens, and without paying such other liens.⁶ In fact, one seeking to redeem, *must* pay the whole bill without reference to priority of liens. So, where upon three executions, lands are sold for a sum sufficient to satisfy all of them, a judgment creditor having the second lien, by virtue of docketing his judgment, if he seeks to redeem must pay the entire sum bid, and not merely enough to satisfy the execution issued upon the judgment senior to his own; and, paying the whole bid to the sheriff, he cannot compel the application of any part of it to his own judgment.⁷ Any assignee of a judgment is entitled to redeem, no matter how trifling a sum he paid for the judgment.⁸ The holding of other and insufficient se-

¹ *People v. Easton*, 2 Wend., 297; *People v. Fleming*, 2 N. Y., 484.

² *Ex parte Lawrence*, 4 Cow., 417; see, too, *Wood v. Torrey*, 6 Wend., 562; *Voorhees v. Gros*, 3 How. Pr., 262.

³ Code Civ. Pro., § 1252; see *ex parte Peru Iron Co.*, 7 How. Pr., 539; *Scott v. Howard*, 3 Barb., 319; *Tufts v. Tufts*, 18 Wend., 621; *Pettit v. Shepard*, 5 Paige, 493.

⁴ *Snyder v. Warren*, 2 Cow., 518; *Martin v. Judd*, 60 Ill., 78.

⁵ *Ex parte Carmichael*, 5 Cow., 17.

⁶ *Jackson v. Budd*, 7 Cow., 658.

⁷ *Silliman v. Wing*, 7 Hill, 159; *Barker v. Gates*, 1 How. Pr., 77; *People ex rel. Post v. Fleming*, 2 N. Y., 484.

⁸ *Ex parte Raymond*, 1 Denio, 272.

curity, as a levy upon insufficient personal property, is not a bar to the creditor's right to redeem.¹

To entitle one to redeem it is sufficient that, when he offers to redeem, he has a lien on the lands sold, and that he offers to redeem within the statutory time. Hence, a creditor under a senior judgment may redeem, though the land be sold on his own junior judgment.² Hence, too, one recovering a judgment against the debtor within the fifteen months, but, after a sale of his land, may redeem from such sale.³

A judgment creditor's right to redeem cannot be affected by the act of the purchaser, upon the execution sale, in paying the judgment, or tendering the amount thereof, under which the creditor claims to redeem, without his consent. The purchaser is a stranger to the judgment, and he has no right to pay the same for the purpose of extinguishing the lien thereof, thereby preventing the holder from redeeming.⁴

The purchaser has only a specific lien upon the premises. It is not until the time of possible redemptions are past, and he is entitled to a deed, and has actually received it, that he has any right, by virtue of his purchase, either to pay a senior lien, or to redeem from a sale under a senior judgment.

Agreeing with the debtor to give time for payment of a judgment, after execution had issued thereon, and a levy on insufficient personal property had been made, does not affect the creditor's right to redeem.⁵

Redemption by County Superintendent or Overseer of the Poor.—The county superintendents and overseers of the poor in the several counties of the State, except the county of New York, shall have the same right to redeem the real estate, which may have been seized by them, pursuant to the provisions of title one of chapter twenty of part one of

¹ *Muir v. Leitch*, 7 Barb., 341.

² *Ex parte Peru Iron Co.*, 7 Cow., 540.

³ *People v. Fleming*, 2 N. Y., 484.

⁴ *People ex rel. McKnight v. Beebe*, 1 Barb., 379; *Jackson ex dem. Lansing v. Law*, 5 Cow., 248; *Same ads. Same*, 9 Cow., 641; *ex parte Peru Iron Co.*, 7 Cow., 540.

⁵ *Muir v. Leitch*, 7 Barb., 341.

the Revised Statutes, as is now possessed by judgment creditors, under the said article second of title five of chapter six of part three of the Revised Statutes. No such redemption shall be made by the said superintendents or overseers, unless, at the time of making such redemption, the seizure of the real estate sought to be redeemed, shall have been confirmed by the court of sessions of the county where such premises may be situated ; nor unless such real estate shall, at the time of making such redemption, be held by the said superintendents or overseers, under and by virtue of the seizure made by them, pursuant to the provisions aforesaid. To entitle such superintendents or overseers to acquire the title of the original purchaser, or to be substituted as purchasers from any other creditor, pursuant to the provisions aforesaid, they shall present to, and leave with, such purchaser or creditor, or the officer who made the sale, the following evidence of their right :

1. A copy of the order of the court of sessions, confirming the warrant and seizure of such real estate, duly certified to by the clerk of the said court of sessions.

2. An affidavit by one of such superintendents or overseers, that the real estate sought to be redeemed is held by such superintendents or overseers, under such warrant and seizure, and that the same have not been discharged, annulled or reversed, but are then in full force.

The said superintendents or overseers shall, for the purpose of making such redemption, have power to use any money in their hands, belonging to the poor funds of their respective towns or counties.

The moneys which may be used by them for the purpose aforesaid, shall be repaid, together with interest thereon, at the rate of seven per cent. per annum, from the time of such redemption, out of the first moneys which may be received by them from the rent or sale of the premises so redeemed.

If such redemption shall be made, and the person against whom the warrant was issued and seizure made, under the provisions of the said title one, of chapter twenty, of part one, shall apply to have the said warrant discharged, he shall, before such warrant and seizure shall be discharged, in addition to the security required to be given by section eleven of the said title, pay to such superintendents or over-

seers, the sum so paid by them to redeem the said real estate, together with interest thereon, at the rate of seven per cent. per annum, from the time of such redemption.¹

Redemption from Redeeming Creditor.—"Where a creditor has redeemed real property, as prescribed in the last section, any other creditor, who might have redeemed it from the purchaser, as therein prescribed, may redeem it from the first redeeming creditor, as follows :

1. He must reimburse to the first redeeming creditor, his executor, administrator or assignee, the sum paid by him to redeem the property, with interest at the rate of seven per cent. a year, from the time of his redemption.

2. He must execute a certificate of satisfaction, relating to his judgment or mortgage, in like manner as the first redeeming creditor was required to do.

3. If the judgment or mortgage, by virtue of which the first creditor redeemed, is prior to the judgment or mortgage of the second creditor, the second creditor must also pay to the first creditor, the sum specified in the certificate of satisfaction, executed by him upon his redemption, with interest at the rate of seven per centum a year, from the time of his redemption ; unless the first redeeming creditor's judgment or mortgage had ceased, when he redeemed, to be a lien as against the second redeeming creditor ; in which case, the latter need not pay any part of the sum, specified in the certificate."²

One, who redeems after a redemption already made, must present his papers and make payment of the moneys necessary to be paid to the last redeeming creditor, or to the officer who made the sale; payment to the original purchaser in such case is not sufficient.³

Section 1451 of the Code of Civil Procedure provides generally for the redemption from a redeeming creditor. And its provisions must be strictly followed by one thus seeking to redeem, though his judgment were docketed at the same instant that the judgment of the redeeming creditor was docketed, under a stipulation that any sums collected

¹ Laws of 1862, chap. 473, §§ 1-6, amending art. 2, title 5, of chap. 6, of part 3, of R. S. ; 3 R. S. (6th ed.), 635; 3 R. S. (7th ed.), 1877.

² Code Civ. Pro., § 1451.

³ *People v. Baker*, 20 Wend., 602.

on the judgments, or either of them, should be shared by the creditors in proportion to the amount of their respective judgments. Of course there would be no priority of lien, and the second creditor need not pay to the first creditor, the sum specified in the certificate of satisfaction executed by him upon his redemption.¹ If the person seeking to redeem from the first creditor, is also the assignee of the sheriff's certificate, he is not bound to reimburse to the first redeeming creditor, the sum paid by him to redeem, if he, himself, has not yet received from the sheriff the amount paid on redeeming by the first creditor.² Of two creditors, seeking to redeem at the same time, he is entitled to the preference, who has the senior lien.³

When Second Redeeming Creditor has the Prior Lien.—“Where the lien of the second redeeming creditor's judgment or mortgage, is prior to that of the first redeeming creditor's judgment or mortgage, so that the former redeems without paying the sum specified in the latter's certificate of satisfaction, the latter may, without executing another certificate of satisfaction, again redeem from the former, or from any subsequent redeeming creditor, in a case, where he would have been entitled to redeem, if his first certificate had not been executed; and he has the same rights, with respect to any creditor redeeming from him, as if his first certificate had been executed, when he made his second redemption.”⁴

Subsequent Redemption by Other Creditors.—“A third or other creditor, who might have redeemed, as prescribed in the last four sections, may redeem from the second or any other creditor, who has redeemed, in the manner, and upon the terms and conditions, prescribed in the last two sections.”⁵

Redemption After Fifteen Months.—“A creditor who might have redeemed within fifteen months after the sale, as prescribed in the last four sections, may redeem from any other redeeming creditor, although the fifteen months have

¹ See *ex parte* Ives, 1 Hill, 639.

² *Ex parte* Newell, 4 Hill, 608.

³ *People ex rel. Post v. Fleming*, 2 N. Y., 484.

⁴ Code Civ. Pro., § 1452.

⁵ Code Civ. Pro., § 1453.

elapsed ; provided, that he thus redeems within twenty-four hours after the last previous redemption.”¹

When Made at Sheriff's Office.—“A redemption, made by a creditor, on or after the last day of the fifteen months, must be made at the sheriff's office of the county. The sheriff, or his under sheriff, or a deputy sheriff, in his behalf, must attend at the sheriff's office, for that purpose, on the last day of the fifteen months, and on each day thereafter, in which a redemption can be made, during the time when the sheriff's office is required by law to be kept open. In the absence of the sheriff, the redemption may be made, by paying the necessary money, and delivering the necessary papers, to the under sheriff, or to any deputy sheriff, present at the sheriff's office. If the term of office of the sheriff, who made the sale, has expired, and he, or his under sheriff, or a deputy sheriff authorized, in his behalf, to receive the necessary money and the necessary papers, is not present, the money may be paid, and the papers may be delivered, to the sheriff then in office, or to the under sheriff or a deputy sheriff of the latter.”²

The mode of obtaining title to land sold under execution, by redemption, is wholly a creation of the statute, and its provisions must be *strictly* followed. Hence, to be valid, the redemption must be made at the sheriff's office of the county, if made on or after the last day of the fifteen months. If made otherwheres, as at the sheriff's dwelling-house, or at an attorney's office, no matter how near to the sheriff's office the place may be, the party seeking to redeem will not be entitled to a deed.³ If made to the sheriff who made the sale, before the last day, it need not even be made in the county where the premises are situated. It may be made anywhere.⁴ Under the Code of Civil Procedure, the redemption, on or after the last day, must be made by delivering the money and the papers to the sheriff himself, if he be present, or to the deputy who made the sale, if he be also present.⁵ In the absence of the sheriff, if

¹ Code Civ., Pro., 1454.

² Code Civ. Pro., 1455; see *People v. Lynch*, 68 N. Y., 473.

³ *Gilchrist v. Comfort*, 34 N. Y., 235; *Morss v. Purvis*, 63 id., 225; aff'g *S. C.*, 2 Hun, 542; *People v. Lynch*, 68 N. Y., 473.

⁴ *Rice v. Davis*, 7 Lans., 393, 403.

⁵ Code Civ. Pro., § 1476.

the under sheriff and a number of deputies be present, the delivery of money and papers may be to any one of them, though one of them made the sale. If a new sheriff be in office, and be actually present with all his deputies, in the absence of the sheriff who made the sale, or a duly authorized deputy of his, the redemption may be made by delivering to the new sheriff, or to any of his deputies, the necessary money and papers. Although the sheriff's office is the county clerk's office, the county clerk cannot receive the necessary money and papers for a redemption, unless specially deputized so to do.¹ A defect in redeeming will not be cured by any act, after the period of redemption expires, of the purchaser or creditor from whom the redemption is made.² If the redemption is valid, any after notice or act of the redeeming creditor will not qualify or affect the redemption.³

When Original Purchaser may Redeem.—"If the purchaser, at the execution sale, of property which can be redeemed by a creditor, as prescribed in this article, is also a creditor of the judgment debtor, and as such could redeem from a purchaser, or a redeeming creditor, he may avail himself of his judgment or mortgage, to redeem from any other redeeming creditor."⁴

When Judgment Creditor may.—"The judgment creditor, by virtue of whose execution real property has been sold, cannot avail himself of the judgment, upon which the execution was issued, to redeem the property; nor, except as otherwise specially prescribed in this article, can a creditor, who has once redeemed, avail himself of the same judgment or mortgage, to redeem again. But if either has another judgment or mortgage, which would entitle him to redeem, he may avail himself thereof for that purpose, in the same manner and on the same terms, as any other creditor."⁵

When One, Entitled to Redeem in Part, may Redeem.—"Where a person, who has an absolute title to, or a judg-

¹ People *ex rel.*, Chase v. Rathbun, 15 N. Y., 528; *aff'g*, Griffin v. Chase, 23 Barb., 278.

² People v. Rathbun, 15 N. Y., 528.

³ Spraker v. Cook, 16 N. Y., 567; *ex parte* Newell, 4 Hill, 608.

⁴ Code Civ. Pro., § 1456.

⁵ Code Civ. Pro., § 1457.

ment or mortgage, which is a lien upon a distinct parcel only of the real property, sold by virtue of an execution, would be authorized, by this article, to redeem the property, if his title or lien extended to the whole, he may redeem, from a purchaser, the entire property sold, or from a prior redeeming creditor, the entire property redeemed by that creditor; except that if his title or lien extends to a distinct parcel only of one or more parts of the property, which were separately sold, he can redeem, from a purchaser, only the part or parts thus separately sold, in which his distinct parcel is included.”¹ Where a sheriff makes a sale of land under three judgments, as a single act, the purchaser acquires his title to each; and another judgment creditor, in order to acquire the rights of the purchaser, must be entitled to do so in respect to all the judgments.²

By Owners of Undivided Shares.—“Where two or more persons own undivided shares, as joint tenants, or as tenants in common, in real property, sold by virtue of an execution, or in a distinct parcel thereof, which has been separately sold; each of them may redeem, from the purchaser, as prescribed in sections 1446 and 1447 of this act, the share or interest belonging to him, by paying a part of the purchase money, bid for the property, or for that distinct parcel thereof, bearing the same proportion to the whole, as the share or interest proposed to be redeemed, bears to the property, or distinct parcel separately sold, of which it is a part; together with interest on the sum so paid, from the time of the sale, at the rate of ten per centum a year.”³

By Creditors of Such Owners.—“Where the judgment or mortgage of a creditor, entitled to redeem, is a lien upon an undivided share, specified in the last section, he may redeem from a purchaser that undivided share, by paying him the same proportion of the purchase money, which the owner must have paid to redeem it, as prescribed in the last section; or he may redeem, from a prior redeeming creditor, the entire property redeemed by the latter, with like effect and in the same manner, as if his lien attached to the whole.”⁴

¹ Code Civ. Pro., § 1458.

² *People ex rel. Post v. Fleming*, 2 N. Y., 484.

³ Code Civ. Pro., § 1459.

⁴ Code Civ. Pro., § 1460; but see as to Illinois, *Durley v. Davis*, 69 Ill., 133.

If the estate of tenants in common be sold on execution against all, the mortgagee of one on redeeming, acquires only that one's title, and the deed should run accordingly.¹

One's Right to Redeem not Affected by Agreement to which he is not a Party.—"The sheriff, the purchaser, the judgment creditor, or a redeeming creditor, cannot, by his agreement or other act, in any manner impair or prejudice the right of any other person to redeem, as prescribed in this article."²

To whom Money Paid.—"The money required to be paid by a creditor, in order to effect a redemption of real property, as prescribed in this article, may be paid to the purchaser or creditor, from whom the property is to be redeemed, his executor, administrator or assignee; or it may be paid, for the use of the person so entitled thereto, to the sheriff who made the sale."³ A person buying at a sheriff's sale of land under execution, whether he be the judgment creditor or a stranger, is legally entitled to his deed at the expiration of fifteen months, unless a valid redemption is made in the meantime. He cannot be deprived of the benefit of his purchase, against his will, by the mere deposit with the sheriff of the amount of his bid, by a person not entitled to redeem.⁴

Where the sale is made by a deputy of the sheriff, either the deputy or the sheriff is the officer who made the sale, and payment may be made to either. Both made the sale; one in fact, and the other in judgment of law.⁵ The redeeming creditor must deliver the requisite papers to the same officer to whom he pays the money; he cannot make the payment to the purchaser, and afterwards deliver the proper papers to the sheriff. It is the official duty of the sheriff to preserve the papers left with him by one redeeming, and to exhibit them, on request, to any third person having an interest in the matter.⁶ A sheriff, in receiving money paid for redemption of real estate, acts as the officer of the law, and not as the agent of the party from whom

¹ Neilson v. Neilson, 5 Barb., 565.

² Code Civ. Pro., § 1461.

³ Code Civ. Pro., § 1462.

⁴ In the matter of opening Eleventh Avenue, 81 N. Y., 436, 452.

⁵ Livingston v. Arnoux, 56 N. Y., 507; People v. Becker, 20 Wend., 602.

⁶ People ex rel. Post v. Ransom, 4 Denio, 145; see Code Civ. Pro., § 1461.

the redemption is made, and in tendering it to such party, he does nothing more than his official duty. A refusal to receive such tender does not affect the fund, nor change the relation of the sheriff as the official depositary of the money; it remains in his hands as its official custodian until the rights of the parties are fully determined, and it is paid by him to the party entitled to receive it, and while thus in his hands it is not subject to levy.¹

Certificate of Satisfaction to be Furnished by Redeeming Creditor.—"The certificate of satisfaction, required to be executed by a creditor, in order to effect a redemption of real property, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county; must describe, with reasonable certainty, the judgment or mortgage under which he redeems, and specify the sum due thereupon; and must state that the redemption satisfies the judgment or mortgage, in full, or to a specified amount. It must be filed in the county clerk's office, at or before the time when the money is paid to effect the redemption, unless the money is paid to the sheriff; in which case, the certificate must also be delivered, at the time of the payment, to the sheriff, who must file it in the county clerk's office, as prescribed in section 1467 of this act. The county clerk, immediately after the execution and recording of the deed, must enter, in his docket, the satisfaction, or partial satisfaction, of a judgment, specified in a certificate so filed, as required by law, when a judgment is collected, by virtue of an execution. If a mortgage, specified in the certificate, is recorded in his office, he must cancel and discharge the mortgage of record, if it is satisfied by the certificate; or, if it is only partially satisfied, he must make a minute of the partial satisfaction, upon the record thereof. If the property mortgaged is situated in a county in which there is a register, the county clerk must transmit a certified copy of the certificate to the register, who must, in like manner, cancel and discharge the mortgage of record, or make a minute of the partial satisfaction thereof. The clerk's and register's fees, for performing the services specified in this section, must be paid by the sheriff, who may

¹ Davis v. Seymour, 16 Minn, 210.

require the person entitled to a deed to pay him the amount thereof, before the deed is delivered.”¹

What Evidence Furnishsd by Redeeming Judgment Creditor.—“In order to entitle a creditor by judgment to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk’s office, or deliver to the sheriff, as the case requires, the following evidence of his right:

1. A copy of the docket of the judgment, under which he claims the right to redeem, duly certified by the county clerk.

2. Each assignment of the judgment, which is necessary to establish his right. An assignment so filed or delivered must be acknowledged or proved, and certified, in like manner as a deed to be recorded, or the execution thereof must be proved by the affidavit of the creditor, or of a witness thereto; unless it has been filed and entered, as prescribed in article third of title first of chapter eleventh of this act, in which case, a certified copy thereof must be filed or delivered.

- 3 An affidavit, made by him, or his attorney or agent, stating truly the sum remaining unpaid on the judgment at the time of claiming the right to redeem.”²

A judgment creditor is not entitled to redeem from a sale on execution under the Code of Civil Procedure, by presenting to the sheriff a copy of the docket of the judgment, under which he claims the right to redeem, if such copy is not signed by the clerk. The fact that a seal was impressed does not help the paper.³ In fact the certificate authenticating the copy need not be under the seal of the court, nor need it state that the copy has been compared with the original.⁴ A deputy county clerk has authority, in the absence of the clerk, to certify the copy; and the certificate need not show on its face the absence of the clerk.⁵ Where the judgment was recovered in one county, and has become

¹ Code Civ. Pro., § 1463.

² Code Civ. Pro., § 1464.

³ Bracket v. Miller, 12 Week. Dig., 235; Gould’s 1881 Digest, 311.

⁴ People ex rel. Post v. Ransom, 4 Denio, 145; Miller v. Lewis, 4 N. Y., 554.

⁵ Miller v. Lewis, 4 N. Y., 554.

a lien on the premises by docketing in another, producing a copy of the docket in the latter county is sufficient.¹

An assignment of a judgment, giving the title of the action, and transferring the judgment to the creditor, is sufficient; although it does not particularly describe the judgment, as to the court in which, the amount for which, or the time when it was recovered.² A mistake in inserting an initial of a middle name in the name of a party, will not affect the assignment.³ If the affidavit proving the execution of the assignment is made by a witness, it should be by the subscribing witness if there is one;⁴ if not, then by any actual witness of the execution.⁵ An affidavit stating that the affiant "was the person to whom the above described judgments were assigned," and that "the same are true copies of the original copies to him" * * * "that he has carefully compared them with such original assignments," is sufficient. Slight variations from the requirements of the statute are not regarded as fatal.⁶ Where a redemption is intended to be under several judgments, it is enough that one of them should be properly certified; the remainder may be disregarded as unnecessary.⁷

One recovering a judgment as survivor is a "creditor by judgment," within the meaning of the statute, relative to redemption from a sheriff's sale. An affidavit by him is a compliance with the statute.⁸ The similarity of the name of the party recovering the judgment, and that of the party making the affidavit, furnishes *prima facie* evidence that the judgment creditor and the affiant are the same person.⁹ If the affidavit is made by an agent, it must expressly state that deponent is the agent. Naming him in the affidavit as

¹ Woolsey v. Sanders, 3 Barb., 301.

² People ex rel. Post v. Fleming, 2 N. Y., 484; aff'g S. C., 4 Denio, 137; Aylesworth v. Brown, 10 Barb., 167.

³ Aylesworth v. Brown, 10 Barb., 167.

⁴ Ex parte Aldrich, 1 Denio, 662.

⁵ People ex rel. Post v. Fleming, 2 N. Y., 484.

⁶ Rice v. Davis, 7 Lans., 393, 402; citing ex parte Newell, 4 Hill, 608; Aylesworth v. Brown, 10 Barb., 167.

⁷ Rice v. Davis, *supra*.

⁸ Nehrbooss v. Bliss, 13 Week. Dig., 168; Gould's 1881 Dig., 312; S. C., noticed but not reported, 25 Hun., 62.

⁹ Nehrbooss v. Bliss, *supra*.

agent is mere description, and no oath to the fact of such agency.¹ The same rule prevails when the affidavit is made by the attorney. The fact that he was attorney on the record in the judgment, on which the proceedings are had, *it seems*, is not enough.²

As to redemption, the sheriff acts under a special statutory authority, and cannot dispense with any requirement.³ If, in an affidavit in proper form, the amount due upon the judgment is, though innocently, over stated, the redemption is invalid.⁴ The affidavit *must* state the true amount due,⁵ although it be made a number of days (e. g., 5) before it is presented to the sheriff, it will be sufficient.⁶

Evidence to be Furnished by Redeeming Mortgage Creditor.—“In order to entitle a creditor by mortgage to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk’s office, or deliver to the sheriff, the following evidence of his right:

1. A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk or register of the county.

2. Each assignment of the mortgage, which is necessary to establish his right, acknowledged or proved, and certified as prescribed in the last section for an assignment of a judgment, unless it has been recorded; in which case a certified copy of the record must be filed or delivered.

3. An affidavit, made by him, or by his attorney or agent, stating truly the sum remaining unpaid on the mortgage, at the time of claiming the right to redeem.”⁷

The certificate of the clerk, authenticating the copy of the mortgage, is good, though it neither bears date nor is

¹ *Ex parte* Bank of Monroe, 7 Hill, 177; *Cunningham v. Goelet*, 4 Denio, 71; *People v. Perrin*, 1 How. Pr., 75; *ex parte* Aldrich, 1 Denio, 662.

² *Ex parte* Shumway, 4 Denio, 258; but see *People v. Ransom*, 2 N. Y., 490, 497.

³ *People v. Covell*, 18 Wend., 598; *People v. Sheriff of Broome*, 19 id., 87; *Hall v. Thomas*, 27 Barb., 55; *Waller v. Harris*, 20 Wend., 555; *aff’g*, 7 Paige, 167.

⁴ *Smith v. Miller*, 25 N. Y., 619; see to the contrary, *Muir v. Leitch*, 7 Barb., 341.

⁵ *Smith v. Miller*, *supra*.

⁶ *Ex parte* Newell, 4 Hill, 608.

⁷ Code Civ. Pro., § 1465.

under seal.¹ An affidavit was held good, where it was in proper form, but was made before the affiant's right to redeem had accrued.² The affidavit should state the amount due positively, not upon belief merely,³ or that a certain amount is due "as claimed by this deponent."⁴

One who has become *ex malificio*, constructively, the trustee of a fund which should be applied to the payment of a real estate mortgage, cannot, by withholding the fund from its due application, and by becoming purchaser of the property on the foreclosure sale thereunder, cut off the mortgagor's right to redeem.⁵

Evidence Furnished by Executor, etc.—"In either of the cases specified in the last two sections, if the person, proposing to redeem, claims to be entitled so to do, by reason of his being an executor or administrator of a person, who, if living, would be entitled to redeem, he must file or deliver, with the other papers therein prescribed, a certified copy or a sworn copy of his letters, testamentary, or letters of administration."⁶

Papers; how Kept by Sheriff, and when Filed.—"The sheriff, to whom one or more papers, specified in the last four sections, are delivered, must keep them open, at all reasonable times during the period allowed for redemption, to the inspection of all persons interested. He must have all those papers at the sheriff's office, at the times when he is required to attend thereat, for the purpose of enabling creditors to redeem, as prescribed by law; and he must file them in the county clerk's office, within three days after the execution of the deed."⁷

Redemption, when Effected.—"A redemption by a creditor is effected, only when he has paid all the money, required to be paid, and filed or delivered all the papers, required to be filed or delivered, as prescribed in this arti-

¹ *People v. Ransom*, 2 Hill, 51; *People v. Ransom*, 4 Denio. 145, aff'd S. C., 2 N. Y., 490.

² *People v. Ransom*, *supra*.

³ *Ex parte Bank of Monroe*, 7 Hill, 177.

⁴ *People ex rel. Cook v. Becker*, 20 N. Y., 354.

⁵ *Bennett v. Austin*, 81 N. Y., 308.

⁶ Code Civ. Pro., § 1466.

⁷ Code Civ. Pro., § 1467.

cle; and a waiver of any of those requirements is void, as against a person who is entitled subsequently to redeem. Where a redemption is thus effected, it vests in the redeeming creditor all the right, title, and interest which the purchaser acquired by the sale,"¹

Certificate of Redemption to be Given.—"Where a redemption is made, as prescribed in this article, the officer or other person, to whom money is paid, or a paper is delivered, for the purpose of effecting the redemption, must execute and deliver, to the person paying the money or delivering the paper, a certificate, stating all the facts which transpired before him, with respect to the redemption."² The receipt or certificate of the sheriff who made a sale on execution, is sufficient evidence of payment of the redemption money, and establishes the complete redemption of the property from the sale under the execution.³

Proof and Record of Certificate of Redemption.—Such a certificate may be acknowledged or proved and certified, in like manner as a deed to be recorded in the county where the property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds, has the same effect, as against subsequent purchasers and incumbrancers, as the recording of a conveyance.⁴

13. *Sheriff's Deed.*

When and by Whom Made.—Immediately after the expiration of fifteen months from the time of the sale; except where a redemption has been made on the last day of the fifteen months, and, in that case, immediately after the expiration of twenty-four hours from the last redemption; the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee

¹ Code Civ. Pro., § 1468.

² Code Civ. Pro., § 1469.

³ *Ellsworth v. Muldoon*, 15 Abb. Pr., 440; *Livingston v. Arnoux*, id., 158.

⁴ Code Civ. Pro., § 1470; see Ill. Rev. Stat., chap. 77, § 19; *Moore v. Hopkins*, 93 Ill., 505.

or assignee. The deed conveys to the grantee therein the right, title and interest, which were sold by the sheriff.¹

To Whom Made.—If any part of the property remains unredeemed by a creditor, it must be conveyed, by the sheriff, to the purchaser upon the sale, except where the certificate of sale has been assigned; in which case it must be conveyed to the last assignee. Any part or parts of the property sold, which have been redeemed by a creditor, except where he has assigned the certificate of redemption, or has executed any other assignment of his right, title and interest in the property redeemed by him; in which case it must be conveyed to the last assignee.²

Contents and Effect of Deed.—A conveyance of property, sold by virtue of an execution, or sold by a sheriff, referee or other person, pursuant to a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, must distinctly state in the granting clause thereof, whose right, title or interest was sold, and is conveyed, without naming, in that clause, any of the other parties to the action; otherwise the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages, which the purchaser sustains by the omission, whether he accepts or refuses to accept it.³

The sheriff's deed relates back to the time of the sale, especially where there are no rights of third parties to be affected.⁴ The deed is conclusive on the sheriff, as to which of several executions the sale was under.⁵ If the land were irregularly sold, or the deed be untrue in point of fact, the party injured has his remedy by motion to the court, or by bill in equity.⁶ The premises conveyed must, in all cases, be specified with so much precision, that from the description, it can be reduced to certainty.⁷ If the premises are correctly described, a variance between the deed and the

¹ Code Civ. Pro., § 1471.

² Code Civ. Pro., § 1472; *Carpenter v. Sherfy*, 71 Ill., 427; *Messerschmidt v. Baker*, 22 Minn., 81; *Gillespie v. Splahn*, 1 Wilson (Ind.), 228.

³ Code Civ. Pro., § 1244.

⁴ *Jackson v. Ramsay*, 3 Cow., 75; *Jackson v. Dickenson*, 15 Johns., 309; *Jackson v. Winslow*, 9 Cow., 13; *Leach v. Koenig*, 55 Mo., 451.

⁵ *Sanford v. Roosa*, 12 Johns., 162; *Buck v. Fox*, 23 Barb., 259.

⁶ *Jackson v. Roberts*, 7 Wend., 83; S. C., aff'd in 11 id., 422.

⁷ *Simonds v. Catlin*, 2 Caines, 61; *Jackson v. Catlin*, 2 Johns., 248.

sheriff's certificate of sale does not affect the purchaser's title.¹ So, where the recitals in the deed and in the certificate describe the same judgment, and the same sale, the deed will not be invalidated because it states that the sale took place in a different month, from that in which it really took place, as appears by the sheriff's certificate.²

The failure of an officer to return an execution to the clerk's office, for more than a year after the sale, that being the period of redemption, will not affect the purchaser's title, if the proceedings have been regular in seizing, advertising and selling the lands. Nor will the failure of the purchaser to place his deed on record, for more than nine months after the sale, provided there has been no intermediate conveyance.³ A sheriff's deed, given in pursuance of a sale under an execution, after describing certain premises, proceeded: "Excepting from and out of such sale, such parts of said premises (if any) as had been lawfully conveyed by said Cowenhoven and others, by conveyances duly recorded in the registrar's office of Kings County, prior to October 12, 1855." It was *held* that the exception did not render the deed void for uncertainty; and that it was not necessary that the excepted parts should be particularly described in the deed.⁴ The judgment and execution need not be set forth, or recited in the sheriff's deed. All that is necessary, is that it should appear they were the authority under which the sheriff acted.⁵

The sheriff's deed to an assignee of the original certificate of sale, is not invalidated by the fact that the certificate had not been acknowledged or proven and filed.⁶ But the assignee cannot compel a conveyance unless he has filed the

¹ Jackson v. Page, 4 Wend., 585.

² Holman v. Holman, 66 Barb., 215; and see Jones v. Scott, 71 N. C., 192; Wilhite v. Wilhite, 53 Mo., 71; Wack v. Stevenson, 54 Mo., 482; Harmon v. Larned, 58 Ill., 167.

³ Caldwell v. Blake, 69 Me., 458.

⁴ Turrett v. Brooklyn Improvement Co., 18 Hun, 6.

⁵ Averill v. Wilson, 4 Barb., 180; Jackson v. Pratt, 10 Johns., 381; Jackson v. Streeter, 5 Cow., 529; Clark v. Sawyer, 48 Cal., 133; Byers v. Wheatley, 59 Tenn., 160; Perkins v. Quigley, 63 Mo., 493.

⁶ Bank of Vergennes v. Warren, 7 Hill, 91; People v. Muzzy, 1 Denio, 239; Chataqua Co. Bank v. Risley, 4 id., 480.

assignment, with the certificate of proof or acknowledgment.¹ The sheriff, however, can waive the recording of the assignment, and give a deed to the assignee without requiring it.²

A sheriff's deed, given in pursuance of a sale upon execution, and duly recorded, is protected by, and has the benefit of, the recording act.³ Such a deed, on an execution running against two persons, is not rendered defective by the use of the singular number on a recital, which under the statute is not essential to the deed; as by stating that, "because sufficient goods and chattels of the said last-named person in the said writ could not be found," the real estate was seized.⁴ Although recitals in a sheriff's deed of land sold on execution, that execution was issued and delivered to him, and that he sold the land under it, may not alone be proof of those facts, yet, together with proof by the testimony of the sheriff to the same facts, corroborated by the production of his entries in his register, they are sufficient, after the lapse of many years.⁵

When Deed to Executor.—Where a person, entitled to a deed, dies before the delivery of the deed, the sheriff must execute and deliver the deed to his executor or administrator. The property so conveyed must be held, in trust, for the use of the heirs or devisees of the decedent, subject to the dower of his widow, if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized.⁶

The sheriff cannot sufficiently answer in mandamus proceedings to compel him to convey lands to the party really entitled thereto, by alleging that he had already conveyed to a redeeming creditor, who had reconveyed to a *bona fide* purchaser for value.⁷

Right to Deed, how Shown.—"Before an assignee, or his executor or administrator, is entitled to a deed, as prescribed in the last two sections, each assignment, under which the

¹ *People v. Ransom*, 2 N. Y., 490; aff'd S. C., 4 Denio, 145.

² *Wood v. Morehouse*, 45 N. Y., 368.

³ *Hetzel v. Barber*, 69 N. Y., 1.

⁴ *Johnson v. Crispell*, 39 Mich., 82; and see *Allen v. Sales*, 56 Mo., 28.

⁵ *Phillips v. Shiffer*, 14 Abb. Pr. (N. S.), 101.

⁶ Code Civ. Pro., § 1473.

⁷ *People v. Fleming*, 2 N. Y., 484; *Reynolds v. Darling*, 42 Barb., 418.

deed is claimed, must be acknowledged or proved, and certified in like manner as a deed to be recorded in the county where the property is situated, and must be filed in the office of the clerk of that county.”¹

When Under-Sheriff to give Deed.—“Where a sheriff dies, is removed from office, or becomes otherwise disqualified to act, at any time after making a sale of real property, by virtue of an execution, the property, or a distinct parcel thereof, may be redeemed, by paying the necessary money, and delivering the necessary papers, to his under-sheriff, who must also execute and deliver the proper deed or deeds of property, not redeemed by the judgment debtor, his heir, devisee or grantee. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the property may be redeemed, by paying the necessary money, and delivering the necessary papers, to the sheriff’s successor in office, who must also execute and deliver the proper deed or deeds. The under sheriff, or the sheriff’s successor, as the case requires, possesses all the powers, and is subject to all the duties and liabilities, of the sheriff who made the sale, touching the redemption and conveyance of property sold, and the proceedings relating thereto: and each provision of law, regulating those proceedings, and applicable to the sheriff who made the sale, is applicable to his under-sheriff or successor. This section applies where a sale was made, either before or after this act takes effect.”²

A deed made by a successor in office of a sheriff who has died, or gone out of office, after making an execution sale, and without having conveyed, operates to pass whatever was sold by his predecessor; but its recitals are not conclusive as to what was sold, as between the purchaser and third persons.”

Money, to Whom Paid.—“Where real property is sold, by virtue of an execution, by the under-sheriff, or a deputy sheriff, in behalf of the sheriff, money required to be paid, or a paper required to be delivered, to the sheriff, in order

¹ Code Civ. Pro., § 1474; and see § 1468, and *ante*, p. 389.

² Code Civ. Pro., § 1475; *Moore v. Williamette Transp. etc., Co.*, 7 Oregon, 359.

³ *Edwards v. Tipton*, 77 N. C., 222.

to effect a redemption as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, may be paid or delivered, either to the sheriff, or to the under-sheriff or deputy sheriff, who made the sale.”¹

Sale by Coroner, or Person Specially Appointed.—“Where real property is sold, by virtue of an execution, by a person specially appointed by the court, as prescribed in section 1362 or section 1388 of this act, it may be redeemed, as prescribed in this article, as if it had been sold by the sheriff, except as follows:”

1. “Money, required to be paid, or a paper, required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, must be paid to the officer who made the sale; unless the person entitled to redeem, his agent or attorney, files with the clerk of the county, with the paper or papers required to be filed, or to be delivered to the sheriff, for the purpose of effecting the redemption; his affidavit, to the effect that the officer is dead, or has been removed, or, where he is a coroner, that he is no longer in office; or, that after diligent search, the affiant has been unable to find him within the county; in which case, the money may be paid into court, by paying it to the county treasurer, to the credit of the cause, with like effect, as where it is paid to the sheriff, after a sale by the latter.”

2. “The provisions of section 1455 of this act, apply to a redemption, upon a sale made as prescribed in this section; and the officer who sold the property, must attend, as the sheriff is therein to attend. If he is not present, the redemption may be effected, as prescribed in that section, for redemption in a case, where the term of office of the sheriff, who made the sale, has expired.”²

“If, when the period for redemption expires, a coroner, or a person specially appointed by the court, who has sold real property, by virtue of an execution, is dead, or has been removed; or, in the case of a coroner, if he is no longer

¹ Code Civ. Pro., § 1476; see *ante*, p. 387.

² Code Civ. Pro., § 1477.

in office, the court must, upon the application of a person entitled to a deed, appoint a person to execute the deed accordingly.”¹

A person merely appointed to execute a conveyance upon an otherwise perfected sheriff's sale, there being no money to be collected, or other act to be done, security is not necessary.²

14. *How Failure of Title to Real Estate Sold, may be Remedied, and Contribution Enforced.*

When Recovery of Purchase Money by Evicted Purchaser.—“The purchaser of real property, sold by virtue of an execution, his heir, devisee, grantee or assignee, who is evicted from the possession thereof, or against whom judgment is rendered, in an action to recover the same, may recover the purchase money, with interest, from the person for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence either :

1. Of any irregularity in the proceedings concerning the sale ; or

2. Of the judgment, upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact.”³

Judgment Creditor's Remedy Thereupon.—“Where final judgment is rendered against the defendant, in an action specified in subdivision first of the last section, the judgment, by virtue of which the sale was made, remains, in his favor, valid and effectual against the judgment debtor therein, his executor, administrator, heir or devisee, for the purpose of collecting the sum paid on the sale, with interest. He may accordingly have a further execution upon that judgment ; but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment or otherwise, whose title or whose incumbrance accrued before the actual levy thereof.”⁴

Contribution Between Owners.—“Where the real prop-

¹ Code Civ. Pro., § 1478.

² Sickles v. Hogeboom, 10 Wend., 562.

³ Code Civ. Pro., § 1479.

⁴ Code Civ. Pro., § 1480.

erty of two or more persons is liable to satisfy a judgment, and the whole of the judgment, or more than a due proportion thereof, has been collected, by a sale of the real property of one or more of them, by virtue of an execution issued upon the judgment ; the person so aggrieved, or his executor or administrator, may maintain an action, to compel a just and equal contribution by all the persons, whose real property ought to contribute as prescribed in the next section but one.”¹

When Part Owners Redeem.—“Where the heir, devisee or grantee of a judgment debtor, having an absolute title to a distinct parcel of real property, sold by virtue of an execution, redeems as prescribed in section 1458 of this act, the property sold, or any part or parts thereof separately sold, which include his property ; he may, in like manner, maintain an action to compel a just and equal contribution by those who own the residue of the property thus redeemed.”²

Contribution, in what Order Made.—“Where an action is brought, as prescribed in the last two sections, the real property is liable to contribution in the following order :

1. If it comprises different undivided shares or distinct parcels, which have been conveyed by the judgment debtor, they are liable in succession, commencing with the portion last conveyed.

2. If it comprises different undivided shares or distinct parcels, which have been sold by virtue of two or more executions, they are liable in succession, commencing with the portion sold under the last and youngest judgment.

3. If it comprises different undivided shares or distinct parcels, some of which have been conveyed by the judgment debtor, and some of which have been sold by virtue of one or more executions, they are respectively liable in succession, according to the order prescribed in the first and second subdivisions of this section.”³

How Enforced by use of Original Judgment.—“For the purpose of enforcing contribution, as prescribed in the last section, the court in which the action is brought, may, and

¹ Code Civ. Pro., § 1481.

² Code Civ. Pro., § 1483.

³ Code Civ. Pro., § 1482.

in a proper case must, permit the plaintiff to use the original judgment, and to collect, by an execution issued thereupon, out of any real property subject to the lien thereof, the sum which ought to be contributed by that property. For that purpose, the lien of the original judgment, upon that real property, when preserved, as prescribed in the next section, continues, for the term prescribed in sections 1251 and 1255 of this act, to the extent of the sum which ought to be so contributed, notwithstanding the payment made by the party seeking contribution.”¹

Lien, how Preserved.—“The lien of the original judgment may be preserved, as prescribed in the last section, by filing in the clerk’s office of the county where the real property is situated, within twenty days after the payment, for which contribution is claimed, an affidavit in behalf of the person aggrieved, stating the sum paid, and his claim to use the judgment for the reimbursement thereof, with a notice, requiring the clerk to make the entries specified in the next section. But the lien is not preserved, as against a grantee or mortgagee in good faith, for a valuable consideration, without notice, and before the entries are actually made.”²

Entry upon Docket.—“On filing the affidavit and notice, the clerk must make upon the docket of the judgment, an entry stating the sum paid, and that the judgment is claimed to be a lien to that amount. Where it is desired to preserve the lien upon property situated in two or more counties, a similar affidavit and notice must be filed with, and a similar entry made by the clerk of each county.”³

15. *Execution Against the Person.*

In what Cases Issued.—“Where a judgment can be enforced by execution, as prescribed in section 1240 of this act, an execution, against the person of the judgment debtor, may be issued thereupon, subject to the exception specified in the next section, in either of the following cases:”

1. “Where the plaintiff’s right to arrest the defendant depends upon the nature of the action.

¹ Code Civ. Pro., § 1484.

³ Code Civ. Pro., § 1486.

² Code Civ. Pro., § 1485.

2. "In any other case, where an order of arrest has been granted and executed in the action, and, if it was executed against the judgment debtor, where it has not been vacated." ¹

As the process, if fair upon its face, is a complete protection to the sheriff, if the defendant is not exempt from arrest, it is unnecessary to review the authorities as to the proper issuing of a body execution. We refer, in the note, to some of the later ones, and also to the statutes of other States.* A body execution is not void or voidable by reason of the omission of the *teste*; and the failure to name the county to which the property execution was issued, and directing the return of the execution, "as required by law," instead of within sixty days from the time of its receipt by the sheriff, are defects in form only, and the execution may be amended as to them upon motion *nunc pro tunc*.³

If the direction to return is left out entirely, the execution is not thereby made void. An amendment of the execution by the insertion of the direction as provided in section 1366 of the Code of Civil Procedure, should be allowed as a matter of course.⁴

Against Women.—An execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and has not been vacated.⁵

Property Execution Must first Issue.—Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail, by virtue of an execution

¹ Code Civ. Pro., § 1487.

² Mass. Gen. Stat. chap. 124; *Pierce v. Phillips*, 101 Mass., 313; *Philbrook v. Kellogg*, 21 Hun, 238; *Sweeney v. Gillooly*, 103 Mass., 549; *Bullymore v. Cooper*, 2 Lans., 71; R. I. Gen. Stat., chap. 211; *Thayer's Petition*, 11 R. I., 160; *Kinnecom v. Waterman*, id., 638; *Re Kindling*, 39 Wis., 35; *Vermont Life Ins. Co. v. Dodge*, 48 Vt., 157; *Ex parte Lamson*, 50 Cal., 306; *Bowden v. Bowden*, 75 Ill., 143; Me. Rev. Stat., chap., 113; *Kelley v. Morris*, 63 Me., 57; *Usher v. Pease*, 116 Mass., 440; *Graves v. Waite*, 59 N. Y., 156; *Mills v. Hildreth*, 5 Hun, 364; *McMeekin v. State*, 48 Ga., 353; *Norman v. Manciette*, 1 Sawyer, 484; *Prouty v. Swift*, 51 N. Y., 594; *Merritt v. Carpenter*, 3 Abb. N. Y. App. Dec., 285; *Bamferd v. Keefer*, 68 Penn. St., 389.

³ Code Civ. Pro., § 24; *People ex rel. Utley v. Seaton, Sheriff*, 25 Hun, 305; S. C., 13 Week. Dig., 240.

⁴ *The Benedict and Burnham Mfg Co. v. Thayer*, 20 Hun, 547.

⁵ Code Civ. Pro., § 1488.

against his person, issued in another action, or of an order of arrest or a surrender by his bail, in the same action, an execution against his person cannot be issued, until an execution against his property has been returned, wholly or partly unsatisfied. If he is a resident of the State, the execution against his property must have been issued to the county where he resides.¹

The judgment debtor may waive his right to have execution first issued against his property, and returned unsatisfied, before the issuance of an execution against his person. The requirement of the Code is for the benefit and protection of the judgment debtor, and one may waive any statutory requirement solely for his own protection.²

Executions Simultaneously Against Property and Person.—An execution against the person of the judgment debtor cannot be issued, without leave of the court, while an execution against his property, issued in the same action, remains unreturned; and an execution against his property cannot be issued, without leave of the court, while an execution against his person, issued in the same action, remains unreturned.³

Where a judgment debtor has been taken, and remains in custody, by virtue of an execution against his person, another execution cannot be issued, in the same action, against his person or his property, except in a case specially prescribed by law.⁴

If a judgment debtor escapes, after having been taken, by virtue of an execution against his person, he may be retaken by virtue of a new execution against his person; or an execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned, without his having been taken.⁵ What will amount to an escape will be seen in a subsequent chapter.

Where a judgment debtor, who has been taken by virtue of an execution against his person, dies while in custody, a new execution against his property may be issued, as if the

¹ Code Civ. Pro., § 1489.

² New York Guaranty, etc., Co. v. Rogers, 71 N. Y., 377.

³ Code Civ. Pro., § 1490.

⁴ Code Civ. Pro., § 1491; see Noe v. Christian, 46 How. Pr., 496.

⁵ Code Civ. Pro., § 1492.

exécution, by virtue of which he was taken, had been returned without his having been taken.¹

At any time after a judgment debtor has remained in custody, by virtue of an execution against his person, for the space of thirty days, the judgment creditor may serve upon the sheriff a written notice, requiring him to discharge the judgment debtor from custody, by virtue of the execution. Whereupon the sheriff must discharge the judgment debtor, and return the execution accordingly. After service of such a notice, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but after his discharge, the judgment creditor may otherwise enforce the judgment, as if the execution, from which he was discharged, had been returned, without his having been taken.² It has been held, in Massachusetts, that an execution on which the judgment debtor has been taken and committed, cannot, after his discharge by consent of the creditor, be levied on his estate.³

The plaintiff in a *qui tam*, or popular action, cannot compound with, or discharge, the defendant, without the order and consent of the court. If the sheriff lets the execution debtor go free, after such discharge, he thereby permits or suffers an escape. The discharge, so far as it relates to the moiety of the penalty belonging to the people, is void, and cannot excuse the escape.⁴

Of course, the sheriff himself, if he discharges the execution debtor of his own motion, becomes liable to the creditor, in damages, to the extent of the debt. If he discharge the debtor, by direction of the creditor's attorney, the *onus* is upon him to show that the discharge was authorized by the creditor. This may be shown, however, by making it to appear that the attorney had duly and legally satisfied the judgment of record, and had notified him of the fact.⁵

Against what Property New Execution not to be Enforced.—"A new execution against property, issued in a case specified in the last two sections, cannot be enforced against

¹ Code Civ. Pro., § 1493.

² Code Civ. Pro., § 1494.

³ *Newell v. Waitt*, 121 Mass., 554.

⁴ *Minton v. Woodworth*, 11 Johns., 474.

⁵ Code Civ. Pro., § 1260, subd. 1.

an interest in real property, including a chattel real, which was purchased in good faith from the judgment debtor, after the recovery of the judgment upon which it is issued; or which was sold by virtue of an execution, issued upon a previous or subsequent judgment.”¹

A sheriff's duty as to execution debtors arrested under the process, will be discussed more at length in a subsequent chapter. It is well to state here, however, that in an action where the defendant has been, before judgment, arrested and admitted to bail, the sheriff must diligently endeavor to enforce any execution issued and delivered to him, either against the property or person of the debtor, notwithstanding any direction he may receive from the plaintiff or his attorney.²

16. *Return of Execution.*

When and how Made.—An execution must require the sheriff to return it to the clerk, with whom the judgment roll is filed, within sixty days after it is received by him.³ In accordance with such requirement, the sheriff must, within the sixty days, file it and the return thereto with such clerk.⁴ In computing the sixty days, the day the execution is received by the sheriff is excluded. He has the whole of the sixtieth day from and after the day of receiving it, in which to make his return. So, if the execution is received by him on the tenth day of June, he may return it at any time during the ninth day of August.⁵ The sheriff must make a corporal return of the execution, with his proceedings indorsed upon it, to the proper clerk. The fact that the sheriff had it in his pocket, with the proper indorsement of how he had executed it upon it, and so was in the clerk's office before the sixty days had expired, does not make a return of the process.⁶ The office of the return is merely to show the satisfaction or part satisfaction of the

¹ Code Civ. Pro., § 1495.

² Code Civ. Pro., §§ 598, 597.

³ Code Civ. Pro., § 1366.

⁴ Code Civ. Pro., § 23.

⁵ *Homan v. Liswell*, 6 Cow., 657; *Muzzy v. Howard*, 42 Vt., 23.

⁶ *Beall v. Shattuck*, 53 Miss., 358; *Balkum v. Harper*, 50 Ala., 429; *Anderson v. Blythe*, 54 Ga., 507; *Bank of Louisville v. Hurt*, 8 Bush (Ky.), 633; *Brown v. People*, 3 Col., 115.

judgment, or the failure to make satisfaction of any part of the judgment.¹ It is no part of its office to show what land is sold upon the execution ;² or the price at which it is sold, or that legal notice of the sale was given.³ And the court cannot compel a sheriff, who has returned an execution, to return further a specification of what was sold to enable the defendant to sue him.⁴ The return may be made at any time within the sixty days, if no goods are found, or if only part of the amount named in the execution is collected.⁵ But, upon being paid the full amount due upon an execution in his hands, a sheriff must *immediately* indorse thereupon a return of satisfaction thereof. He must also "deliver to the person making the payment, upon the latter's request, and payment of the fees allowed by law therefor, a certified copy of the execution, and of the return of satisfaction thereupon ; which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket of the judgment, as if the judgment roll was filed in his office, and the execution was returned to him as satisfied. But this section does not exonerate the sheriff from his duty to return the execution to the clerk with whom the judgment roll is filed." ⁶

It would seem, however, that the sheriff need not make the corporal return of the execution, so indorsed, to the proper clerk until the last of the sixty days, if he chooses to wait. At the end of the sixty days he must return the execution, whether or not the entire amount, or any part of it, has been made, with his proceedings indorsed thereon, which indorsement must be under his hand ; that is, signed by him, to the clerk with whom the judgment roll is filed.⁷ Such return may be made by delivering the execution so indorsed to the proper clerk personally ; or, if the officer

¹ Gardner v. Eberhart, 82 Ill., 316.

² Jackson v. Walker, 4 Wend., 462; Gardner v. Eberhart, 82 Ill., 316.

³ Miller v. Wilson, 32 Md., 297; see Bell v. Weatherford, 12 Bush (Ky.), 505; Dawson v. Jackson, 62 Ind., 171; Stewart v. Houston, 25 Ark., 311; Kinney v. Knoebel, 47 Ill., 417.

⁴ Shindler v. Blunt, 1 Sandf., 683.

⁵ Whitehead v. Helen, 74 N. C., 679.

⁶ Code Civ. Pro., § 1266.

⁷ Code Civ. Pro., § 102.

making the return in the name of the sheriff, resides in a place other than where the clerk's office is situated, by depositing the execution in the post-office nearest to the place of residence of the officer making the return, properly inclosed in a post-paid wrapper, addressed to the clerk, at the place where his office is situated.¹ The return, indorsed upon the execution, should substantially state what the officer had collected upon it, if he have collected anything. If a levy had been made, but the sale had not been had within the sixty days, the return should state the fact. Nothing, without the consent of the judgment creditor, or the direction of the court, will excuse the sheriff from making the required return. If the return is not made, the presumption is that the officer did not even make a levy, and actually omitted to do anything in the discharge of his duty to collect the execution.² A sheriff must return an execution, although he has paid over a part of the money collected, and the remainder has been attached, and, if he neglects so to do, an attachment may issue against him. It is no answer for him to say that he has not been notified to make a return.³ The defendant, as well as the plaintiff, may require the sheriff to return an execution on which money has been collected or paid, unless the parties have compromised before the return day, in which case neither party can compel a return. But the plaintiff cannot compel the sheriff to return a writ, in the hands of a special deputy appointed by him, at the request of the plaintiff.⁴

It has been held that where part of the money collected on an execution has been attached, and the sheriff has not been notified to make a return of the execution, an order for an attachment against him should be modified by adding, "unless within ten days a return of it shall be made according to the demand thereof."⁵

¹ Code Civ. Pro., § 102.

² *Wehle v. Conner*, 63 N. Y., 258.

³ *Parker v. Bradley*, 46 N. Y. Super. Ct. (14 J. & S.), 244; and see *Wehle v. Conner*, 63 N. Y., 258; aff'g S. C., 40 N. Y. Super. (8 J. & S.), 24; *Same v. Same*, 69 N. Y., 546; rev'g S. C., 41 N. Y. Supr. (9 J. & S.), 201.

⁴ *Crocker on Sheriffs*, § 427; citing *Allen*, 202; *Sewall*, 409; *Demoranda v. Dunkin*, 4 Tr., 119.

⁵ *Parker v. Bradley*, 46 N. Y. Supr. (14 J. & S.), 244.

If the return is made by the under sheriff or by a deputy, it must be in the name of the sheriff.¹ If it be in the name of the officer making the return, and not in that of the sheriff, it is not a sufficient return.² If the sheriff makes an evasive return, so that the plaintiff cannot safely proceed against him in an action for a false return, he may be required to perfect his return, even though the time for bringing an action has by statute expired since the date of return.³ The New York Superior Court has power to compel the sheriff of a foreign county to return an execution, issued from that court, as incident to the authority to issue the same.⁴

A sheriff will be protected against an action for a false return, unless bad faith appears, where he returns that he made a levy upon goods; that the title to the goods was disputed; that he summoned an inquest, and the title was found against him, and no indemnity was given him, or other protection afforded him.⁵

An execution issued against a city marshal on a district court judgment, a transcript of which has been filed in the county clerk's office, must be returned by the sheriff to the clerk of the court of common pleas, and not to the clerk of the city and county of New York; the local act, Laws 1862, chapter 484, not being repealed by section 1367 of the Code of Civil Procedure.⁶

Return "nulla bona."—If the sheriff finds no goods or chattels, lands or tenements, of the judgment debtor within his county, out of which the execution may be made, he may indorse upon the execution, over his signature, the words "*nulla bona*," and return it so indorsed to the proper clerk, at any time within the sixty days. Such return may be made, where, though the debtor has property, yet it is so subject to previous liens that the amount of the execu-

¹ *Ante*, p. 16.

² *Simonds v. Catlin*, 2 Caines, 61; S. C., Col. & Cal. Cas., 346.

³ *Davis v. Weyburn*, 1 How. Pr., 153.

⁴ *Shindler v. Blunt*, 1 Sandf., 683.

⁵ Code Civ. Pro., §§ 1418, 1419; *Bayley v. Bates*, 8 Johns., 185; *Van Cleef v. Fleet*, 15 id., 147; *Curtis v. Patterson*, 8 Cow., 65.

⁶ *Bartel v. Cunningham*, 59 How. Pr., 129; S. C., 8 Abb. N. Cas., 226. See Consol. Act., 1882, § 1398.

tion, or any part thereof, could not be made out of it. A sheriff always acts at his peril, in returning an execution "*nulla bona*." It is true that in an action for a false return, the plaintiff must falsify the return. He may do this, however, by *prima facie* evidence; *e. g.*, if he show property in the possession of the execution debtor, which might have been levied upon under the execution, he has shown sufficient to sustain the case. And the burden is upon the sheriff to show that the debtor had no title to, or leviable interest in, the property during the sixty days subsequent to the receipt of the execution by him, or that the title to the property was disputed, and he had duly proceeded according to the provisions of the Code of Civil Procedure, and the jury had found the title in the third person, and the execution creditor offered no indemnity or other protection.¹

An officer's return on a sale of the right of a debtor of redeeming mortgaged land, which sets forth that "I could not find the debtor in my precinct," is a sufficient return, and the fact that the return also stated that a notice was sent by mail is immaterial.² So, an entry by the sheriff on an execution, "no property pointed out on which to levy this *fi fa*," with the date, was held sufficient.³ But the easiest and best return of nothing collected, which a sheriff can make, is to indorse the words "*nulla bona*" over his signature, upon the execution.⁴ But a return in the words "wholly unsatisfied" is insufficient;⁵ the return must be, in effect, that no property could be found out of which to make the execution. A return of "*nulla bona*," after levy and inventory, has been held to be regular and proper; the legal import of such return, is simply that the goods levied upon are not applicable to the plaintiff's writ.⁶

¹ *Magne v. Seymour*, 5 Wend., 309; *Curtis v. Patterson*, 8 Cow., 65; *Lumis v. Kasson*, 43 Barb., 373; *Mumper v. Rushmore*, 79 N. Y., 19; *Denton v. Livingston*, 9 Johns., 96; *Cromwell v. Gallup*, 17 Hun, 49.

² *Owen v. Neveau*, 128 Mass., 427.

³ *Ellis v. Atlantic and Gulf R. R. Co.*, 61 Ga., 362; and see *Treptow v. Buse*, 10 Kan., 170; *Howell v. Donaldson*, 7 Heisk. (Tenn.), 206.

⁴ See *Barker v. Dayton*, 28 Wis., 367; *Lovegrove v. Brown*, 60 Me., 592.

⁵ *McDowell v. Clark*, 68 N. C., 118.

⁶ *Waterman v. Merrill*, 33 N. J. L. (4 Vr.), 378.

Disposition of Proceeds.—Formerly, in strictness, moneys collected upon an execution by a sheriff were to be brought into court.¹ Afterward it became a sufficient answer for a sheriff, when sued for not bringing the moneys into court, to say that he had paid them over into the hands of the execution creditor. And, latterly, the general practice has been to pay the proceeds to the execution creditor, or to his attorney. There is no statute governing the subject, and, in this regard, expressly pointing out the sheriff's duty. But the practice has been from the earlier times, for the sheriff to bring the money into court. And this practice is good even at the present time. If there *can* be no doubt as to who is entitled to the proceeds, the sheriff should pay them over to the one entitled to receive them, or to his attorney. But if there be doubt, if there be adverse claimants of the proceeds, the sheriff is not bound, at his peril, to determine the matter, nor need he apply to the court for direction and protection. He may, with the execution and as part of the return thereof, deliver the proceeds to the clerk of the county where the execution is to be returned. This is a payment of the money into court.² Under the Code the money might be paid by the sheriff directly to the county treasurer.³ It is better, however, to return the money with the execution to the county clerk, when it is desired to bring the proceeds into court.

The sheriff is not bound to pay over the proceeds as soon as he has collected them, although a return of execution and proceeds should always be made as soon as it conveniently can be. But if the officer retain the money, without a sufficient excuse, after the sixty days, he is liable to an action therefor, and may be compelled to pay interest upon the amount from the expiration of the sixty days. The sheriff cannot, when sued, pay the money into court, and thus protect himself from costs and interest.⁴ An action may be maintained against the sheriff for the proceeds, if

¹ Bacon's Abridgement (tit. Execution, C).

² Nelson v. Kerr, 59 N. Y., 224; Acker v. Ledyard, 8 id., 62; and see Brown v. People, 3 Col., 115.

³ Code Civ. Pro., § 745.

⁴ Dygert v. Crane, 1 Wend., 534; Dale v. Birch, 3 Camp., 346; Swain v. Merland, 1 B. & B., 370.

he neglects to make a proper disposition of them, without a previous demand.¹ Though an officer sell under a particular execution, he may, at any time before the return of the process, apply the proceeds upon another execution, which he, subsequently to the sale, discovers to be prior to that under which the sale was made.²

Effect of Return.—The lien of an execution without levy, expires with the return thereof.³ It has been held that the sheriff's return of a sale of land on execution, stating the facts requisite to constitute a sale, takes the contract out of the statute of frauds.⁴ The return of a sheriff upon an execution, as to matters required to be returned in the discharge of his official duties, cannot be contradicted by the sheriff, nor by the parties to the execution, by parol evidence, except in a direct proceeding.⁵ But, as to acts not official or necessary in the performance of his duty, the return is no evidence whatever, at least in the sheriff's favor.⁶ It might operate as an admission against him. But a judgment creditor in an execution is not so bound by the return of *nulla bona* on the writ, that he may not be permitted to show, in a direct proceeding, that during the life of the execution, there was personal property belonging to the execution defendant, within the jurisdiction of the officer, which might have been seized by him.⁷

Liability for Neglect to Return.—The liability of the sheriff for neglect to make a return, will be discussed more fully in a subsequent chapter. Suffice it here to say that an action may be maintained against the sheriff by the execution creditor, for a neglect to return the execution within

¹ *Nelson v. Kerr*, 59 N. Y., 224; *Brewster v. Van Ness*, 18 Johns., 133.

² *Peck v. Tiffany*, 2 N. Y., 451.

³ Code Civ. Pro., § 1405; *Hathaway v. Howell*, 54 N. Y., 97; *Sturges' Appeal*, 86 Penn. St., 413; *Carnahan v. People*, 2 Ill. App., 630.

⁴ *Linn Boyd, etc., Co v. Terrill*, 13 Bush (Ky.), 463; *Sanborn v. Chamberlain*, 101 Mass., 409.

⁵ *Sheldon v. Payne*, 7 N. Y., 453; *Russell v. Gray*, 11 Barb., 541; *Gillespie v. Splahn*, 1 Wilson (Ind.), 228; *Wilcox v. Emerson*, 10 R. L., 270; *Bogne's Appeal*, 83 Penn. St., 131; *True v. Emery*, 67 Me., 28; *Hotchkiss v. Hunt*, 56 Me., 252.

⁶ *Browning v. Hanford*, 5 Den., 586; *rev'g S. C.*, 7 Hill, 120; *Lindley v. Kelley*, 42 Ind., 294.

⁷ *Re Tills*, 11 Bank'r Reg., 214; and see *Treptow v. Buse*, 10 Kan., 170.

the sixty days. And the measure of damages, ordinarily, would be the amount due upon the execution. But the amount of damages may be reduced by showing that the defendant had no property; or that the plaintiff had less interest in the execution than the face of it, and that he has no right to demand the payment of the full amount thereof.¹ It may also be shown that the judgment was fraudulent and void; that it has been paid, assigned, and does not belong to the plaintiff.² So proof that the plaintiff had directed the execution not to be returned, or that the sheriff had procured it to be stayed by the order of the court, are lawful defenses.³ Anything, in fact, which attacks the judgment, or shows that the plaintiff's interest is affected, is a good and valid defense to the action. Therefore, any evidence which proves that the plaintiff's interest is beyond his control, as that it is levied upon by an attachment, and is liable to be applied on the same, or on a valid process to the payment of his lawful debts, is proper to be considered. In fact, there is no rule of law which precludes proof, showing that less damages have been sustained than the amount of the execution, even when the neglect is not justified or excused.⁴ But if the execution creditor assumes to control the execution, or to treat it as properly in the hands of the sheriff after the return day has passed, he waives his right of action. He cannot treat the process as rightfully in the hands of the officer, and at the same time sue for damages because it was not returned.⁵ Of course such matters as the plaintiff's interference and extension of time must be alleged by the sheriff in defense, and the *onus* is upon him to prove them.⁶ But the officer may make a return of "*nulla bona*" even after the action is commenced against him, for the failure to make return within the sixty days.⁷ Such return will be

¹ *Wehle v. Connor*, 69 N. Y., 546, 549.

² *Wehle v. Connor*, 69 N. Y., 550; citing *Crocker on Sheriffs*, § 853, and cases cited; *Cornell v. Barnes*, 7 Hill, 35.

³ *Root v. Wagner*, 30 N. Y., 1; *Homan v. Liswell*, 6 Cow., 659; *Gorham v. Gale*, 7 id., 739; *Humphrey v. Hathorn*, 24 Bush., 278.

⁴ *Wehle v. Connor*, 69 N. Y., 547.

⁵ *McKinley v. Tucker*, 6 Lans., 214; overruling *Same v. Same*, 59 Barb., 93; *Corning v. Southland*, 3 Hill, 552; *Sawyer v. Glenn*, 11 Heisk. (Tenn.), 754.

⁶ *Chaffin v. Stuart*, 57 Tenn., 296.

⁷ *Bechstein v. Sammis*, 10 Hun, 585.

evidence in his favor,' notwithstanding it was made after the commencement of the action ;² and unless the plaintiff contradicts the return, he is entitled to recover only nominal damages.³ The officer so sued may show in his defense that the execution was void for want of jurisdiction, notwithstanding he has collected a part of the amount, and has made a return of his proceedings in so doing. By collecting a portion of the amount, he did not become bound to collect the remainder. When an officer becomes satisfied that there is a want of jurisdiction, he is not bound to act further in any way.⁴

Amendment and Canceling of Return.—The Supreme Court possesses general authority over its own records, and may, in its discretion, permit amendments of them to be made. The practice is very common, and the power well ascertained. It may, on motion, alter, amend, correct or cancel a return to make it conformable to truth, or to relieve a sheriff from a mistake or wrongful act of his deputy, where the *rights* of third persons are not affected thereby.⁵ The return may be amended, by leave of court, at any time, even after an action has been commenced against the sheriff, for an insufficient and false return,⁶ or after the death of the sheriff, or after the expiration of his term of office.⁷

A deputy sheriff returned an execution "*nulla bona.*" Thereafter, with the consent of the plaintiff's attorney, and of the county clerk, he took the execution from the clerk's office, erased the return, and collected moneys on the execution. It was held, by the Court of Appeals, that the process was erroneous and not void, and that the sheriff was responsible to the plaintiff for the moneys. That the party not having applied to have the execution set aside, the sheriff could not avail himself of any defects in it.⁸

¹ *Browning v. Hanford*, 5 Denio, 586; *Water Com'rs v. Lansing*, 45 N. Y., 19; *Russel v. Gray*, 11 Barb., 541; *Henderson v. Carins*, 14 Barb., 15.

² *Glover v. Whittenhall*, 2 Denio, 633; *Birkbeck v. Stafford*, 14 Abb. Pr., 285.

³ *Bechstein v. Sammis*, 10 Hun, 585.

⁴ *Tucker v. Malloy*, 48 Barb., 85.

⁵ *Barker v. Binninger*, 14 N. Y., 270; *King v. Russell*, 40 Tex., 124; *Granberry v. Crosby*, 7 Heisk (Tenn.), 579; *Jarboe v. Hall*, 37 Md., 345.

⁶ *People v. Ames*, 35 N. Y., 482.

⁷ *Perdew v. Davis*, 31 Tex., 488; *Flanagan v. Tinen*, 53 Barb., 587; S. C., 37 How. Pr., 130; *Scruggs v. Scruggs*, 46 Mo., 271; but see *Bibb v. Collins*, 51 Ala., 450.

⁸ *James v. Gurley*, 48 N. Y., 163.

CHAPTER V.

OF THEIR DUTIES IN SPECIAL PROCEEDINGS, AND IN CERTAIN CASES.

SECTION I.

SPECIAL PROCEEDINGS COMMENCED BY WRIT.

1. *Habeas Corpus to Testify.*

This writ may be issued by any court of record, other than a justice's court of a city, or by any judge of such court of record, or justice of the Supreme Court, in an action or special proceeding, civil or criminal, pending therein, for the purpose of bringing before the court a prisoner detained in a jail or prison within the State, to testify as a witness in the action or special proceeding in behalf of the applicant. Such writ is issued on the application of a party to such action or special proceeding.¹ Such writ may also be issued by any justice of the Supreme Court, on the application of a party to a special proceeding, civil or criminal, pending before any officer or body authorized to examine a witness therein; and a judge of a superior city court, a county judge or a special county judge, residing in the same county where the officer resides, or the court or other body sits, in or before which such special proceeding is pending, may issue such writ.² So, also, upon the application of a party to an action, pending before a justice of the peace, or in a justice's court of the city, or a district court of the city of New York, such writ may be issued by a justice of the Supreme Court; or, if residing within the county where the justice resides, or the court is located, or the pris-

¹ Code of Civ. Pro., 2008; Laws 1880, chap. 416; 3 R. S. (7th ed.), §§ 2624, 2625, id. (6th ed.), §§ 1106, 1107; id. (5th ed.), § 1101.

² Code Civ. Pro., § 2009.

oner is confined, as the case may be, by a judge of a superior city court, a county judge or a special county judge, for the purpose of bringing before such justice of the peace or justice's court of a city, or district court, a prisoner confined in the jail of the county where the action is to be tried, or an adjoining county.¹

Shall not Issue, when.—Such writ shall not be issued to bring up a prisoner sentenced to death, nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only by and in the discretion of a justice of the Supreme Court, or a judge of a superior city court.²

Must be Under Seal.—The writ must be under the seal of the court by which it is awarded. Where it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal other than a court of record, it must be issued under the seal of the Supreme Court. Where, as above required, the seal of the Supreme Court is required, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.³

Allowance of Indorsed.—The presiding judge of a court, by which such writ is awarded, or the judge or justice who allows such writ out of court, must sign an allowance thereof indorsed thereupon, stating the date of the allowance;⁴ and where it is awarded, on the application of the attorney-general or district attorney, having charge of the action or special proceeding, the indorsement of the allowance thereof must state that it was issued on such an application.⁵

Form of, and when Returnable.—It must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. The officer or other person, against whom the writ is issued, shall be

¹ Code Civ. Pro., § 2010.

² Code Civ. Pro., § 2011.

³ Code Civ. Pro., § 1992.

⁴ Code Civ. Pro., § 1996.

⁵ Code Civ. Pro., § 1993.

styled the defendant therein;¹ and it may be made returnable forthwith, or on a future day named therein.²

Service of.—The writ can be served only by an elector of the State. Service may be made by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person, upon whom the writ ought to be served, keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place on the outside, either of his dwelling-house, or the place where the prisoner is confined, and in such case the service is complete, without tendering the fees or charges for bringing up the prisoner.³ Where the prisoner is in custody of a sheriff, coroner, constable or marshal, the service is not complete unless the person serving the writ tenders to the officer the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect that the surety will pay the charges of carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be at least twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be \$1,000.⁴ A court or a judge, allowing a writ of *habeas corpus*, directed to any person other than a sheriff, coroner, constable or marshal, may, in its or his discretion, require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner; and in such case the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.⁵ But where the writ is allowed on the application of the attorney-general,

¹ Code Civ. Pro., § 1994.

² Code Civ. Pro., § 1998.

³ Code Civ. Pro., §§ 2003, 2005.

⁴ Code Civ. Pro., § 2000.

⁵ Code Civ. Pro., § 2001.

or a district attorney, these provisions in regard to tendering fees and delivering an undertaking do not apply,¹ and, as we have just seen, the tender of fees is excused in case the person upon whom the service should be made, keeps himself concealed or refuses admittance.

Return to, and Production of Prisoner.—Any officer to whom the writ is delivered, whether directed to him or not, must make a return thereto, stating for what cause the prisoner is held, and must obey the writ by producing the prisoner as therein required, unless he be confined under sentence of death, when a return to that effect, without producing him, is a sufficient obedience. Upon a refusal or neglect to make such return, and to obey said writ, such officer forfeits to the people—if the writ was issued upon the application of the attorney-general, or a district attorney, or, in any other case, to the party on whose application the writ was issued—the sum of \$500.²

When a term of court fails, or is adjourned, or the time or place of holding the same is changed, a writ returnable at that term, is not thereby abated, discontinued or rendered void, but is then returnable at the time and place to which the term is adjourned or changed, or, if it fails, at the next term.³

The officer need only look to the writ itself, and, if it is issued by a court or officer having authority, he is protected in obeying it, notwithstanding it may have been issued irregularly and erroneously.⁴ Where the writ is returnable on a day certain, the return must be made at the time and place therein specified. Where it is returnable forthwith, at a place within twenty miles of the place of service, the return must be made, and the prisoner produced, within twenty-four hours after service, and the like time must be allowed for each additional twenty miles.⁵

Remanding after Testimony, and Custody in Meantime.—If it appears, from the return, that the prisoner is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge,

¹ Code Civ. Pro., § 2002.

⁴ *Wattles v. Marsh*, 5 Cow., 176.

² Code Civ. Pro., §§ 2004, 2013, 2014.

⁵ Code Civ. Pro., § 2006.

³ Code Civ. Pro., § 44.

he must, after having testified, be remanded, and again committed to the prison from which he was taken.¹

The prisoner is not released from the custody of the sheriff or officer by this writ, but simply from actual custody in prison for the purpose only of giving his testimony, and in obedience to the writ the officer should conduct him by the most direct way, at the time and to the place named, to give his testimony, and, after the purpose of the writ is accomplished, reconduct him to the prison; and if the testimony be not taken at one sitting, should not permit the prisoner to be out of actual confinement in prison any longer than necessary, in strict obedience to the writ; and is liable for an escape, if he goes with him out of his way, in going from or returning to prison to accommodate the prisoner, or permit him to be at large pending the taking of his testimony.²

When not Necessary.—When it shall be necessary for any purpose, to bring any prisoner confined in a county jail before any court of oyer and terminer, or any court of general sessions, which may be sitting in such county, such court may, by order, and without issuing any writ of *habeas corpus*, or other process, direct such prisoner to be brought before them accordingly.³

2. *Habeas Corpus or Certiorari, to Inquire into the Cause of Detention.*

Who Entitled to, and when not Allowed.—Any person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled to a writ of *habeas corpus*, or a writ of *certiorari*, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom, except in either of the following cases:

1. Where he has been committed, or is detained by virtue of a mandate, issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have

¹ Code Civ. Pro., § 2013.

² The People ex rel. Backus v. Stone, 10 Paige, 606; Watson on Sheriffs, 139.

³ 3 R. S. (5th ed.), 1042; id. (6th ed.), 1046; id. (7th ed.), 2576.

acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal, made in a special proceeding instituted for any cause, except to punish him for a contempt, or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.¹

Application for, to whom.—Application for either writ must be made by a written petition, signed either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers:

1. The Supreme Court, at a special or general term thereof, where the prisoner is detained within the judicial district within which the term is held.

2. A justice of the Supreme Court, in any part of the State.

3. An officer authorized to perform the duties of a justice of the Supreme Court at chambers, being or residing within the city or county where the prisoner is detained; or, if there is no such officer within that city or county, capable of acting, or, if all those who are capable of acting, and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.² A judge of a superior city court within his city, and a county judge within his county, are authorized to perform the duties of a justice of the Supreme Court at chambers.³ Where the application is made to one of such officers residing out of the county in which the prisoner is detained, he must require proof, by the oath of the applicant or other sufficient evidence, of the facts which give him authority to act; and if a judge in the county in which the prisoner is detained, authorized to grant the writ, is alleged to be incapable of acting, the cause of the incapacity must be specially set forth; and if such proof is not produced, the application must be denied.⁴ The petition must be verified by the oath

¹ Code Civ. Pro., §§ 2015, 2016.

² Code Civ. Pro., § 2017.

³ Code Civ. Pro., § 241.

⁴ Code Civ. Pro., § 2018.

of the petitioner, to the effect that he believes it to be true, and must state, in substance :

1. That the person, in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty ; the place where, unless it is unknown, and the officer or person by whom he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party whose name is unknown.

2. That he has not been committed and is not detained, by virtue of any judgment, decree, final order or process, specified in section 2016 of the Code, and given above.

3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition ; unless the petitioner avers either that by reason of the removal or concealment of the prisoner before the application, a demand of such copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

6. It must specify whether the petitioner applies for the writ of *habeas corpus* or for the writ of *certiorari*.¹

When Granted.—Upon presentation of such petition to such court or officer before mentioned, either writ must be granted without delay, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ.² And where a justice of the Supreme Court, in court or out of court, has evidence in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State ; or where any other judge, authorized to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides ; he must issue a writ of *habeas*

¹ Code Civ. Pro., §§ 2019, 2016.

² Code Civ. Pro., § 2020.

corpus or a writ of *certiorari*, for the relief of that person, although no application therefor has been made.¹

Habeas Corpus, Form of.—This writ must be in substantially the following form, the blanks being properly filled up :

“The People of the State of New York,

“To the sheriff of _____,” etc. (or “to A. B.”)

“We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before

” (‘the Supreme Court, at a special’ [or ‘general’] ‘term thereof, to be held,’ or ‘E. F., Justice of the Supreme Court,’ or otherwise as the case may be), “at _____, on _____” (or ‘immediately after the receipt of this writ’), “to do and receive what shall then and there be considered, concerning the said C. D. And have you then and there this writ.

“Witness, _____, one of the justices” (or ‘judges’) of the said court” (or ‘county judge,’ or otherwise as the case may be), “the _____ day of _____, in the year eighteen hundred and _____.”

Certiorari, Form of.—The following is the form in which this writ must be, substantially, the blanks being properly filled :

“The People of the State of New York,

“To the sheriff of _____,” etc. (or ‘to A. B.’)

“We command you, that you certify fully and large, to _____” (‘the Supreme Court, at a special’ [or ‘general’] ‘term thereof, to be held,’ or ‘E. F., justice of the Supreme Court,’ or otherwise as the case may be), “at _____, on _____” (or ‘immediately after the receipt of this writ’), “the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D., is called or charged. And have you then and there this writ.

“Witness, _____, one of the justices” (or ‘judges’) “of the said court” (or ‘county judge,’ or otherwise as the case may be’), “the _____ day of _____, in the year eighteen hundred and _____.”

¹ Code Civ. Pro., § 2025.

² Code Civ. Pro., § 2022.

² Code Civ. Pro., § 2021.

Not to be Disobeyed for Defect of Form.—Neither of these writs, however, shall be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner is designated, either by his name or office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person, upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the prisoner directed to be produced is designated by name, or otherwise described in any way, so as to be identified as the person intended.¹

Seal and Allowance Indorsed.—Like the writ of *habeas corpus*, to testify, both of these writs must be under seal, and the allowance thereof must be indorsed; and what has been said in regard to the sealing, and indorsing allowance on the writ of *habeas corpus* to testify, is equally applicable to either of these writs.

Where Returnable.—If application for either writ is made to the Supreme Court, or to a justice thereof, in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.² But after the court of oyer and terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county, upon any criminal charge, shall be removed therefrom by any writ of *habeas corpus*, unless such writ shall have been issued by such court of oyer and terminer, or shall be made returnable before it.³ Except as here indicated, these writs are returnable before the court or officer granting them. The writ of *habeas corpus* cannot be made returnable on Sunday.⁴

Service of either Writ.—The writ of *habeas corpus* is served in the same manner as the writ of *habeas corpus* to

¹ Code Civ. Pro., § 2024.

² Code Civ. Pro., § 2023.

³ 3 R. S. (5th ed.), 1066; id. (6th ed.), 1067; id. (7th ed.), 2593.

⁴ Code Civ. Pro., § 2015.

testify, and what has been said in regard to such service, need not here be repeated. It only needs to be added that the writ may be issued and served on Sunday, and it should be borne in mind that the service can only be made by an elector of the State.¹ The writ of *certiorari* may be served by delivering it to the person to whom it is directed. If he cannot be found with due diligence, it may be served by leaving it at the jail or other place in which the prisoner is confined, with any under officer or other person of proper age, having charge for the time of the prisoner. If the person, upon whom the writ ought to be served, keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside either of his dwelling-house, or of the place where the prisoner is confined.²

Concealing or Removing Prisoner.—Any one having in his custody, or under his power, a person entitled to a writ of *habeas corpus* or *certiorari*, or for whose relief such writ has been duly issued, who transfers the prisoner to the custody, or places him under the power or control of another, or conceals him, or changes the place of his confinement, with intent to elude the service of the writ, or to avoid the effect thereof, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished by fine not exceeding \$1,000, or by imprisonment not exceeding six months, or by both, in the discretion of the court.³ And a person who knowingly assists in so doing is also guilty of a misdemeanor, and subject to the same punishment.⁴ And, by the Penal Code, a person having in his custody or power, or under his restraint, one who would be entitled to a writ of *habeas corpus* or *certiorari*, or for whose relief a writ of *habeas corpus* or *certiorari* has been issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, transfers the party to the custody, or places him under the power or control of another, or conceals or changes the place of his confinement, or who, without lawful excuse, refuses to pro-

¹ Code Civ. Pro., § 2015; *People ex rel. Phelps v. Fancher*, 2 Hun, 226, 236; *People v. Brennan*, 61 Barb., 540, 546.

² Code Civ. Pro., § 2003.

³ Code Civ. Pro., § 2052.

⁴ Code Civ. Pro., § 2053.

duce him, is guilty of a misdemeanor, punishable by a fine not exceeding \$1,000, or by imprisonment not exceeding six months, or both ; and, in addition, forfeits to the party aggrieved \$1,250, to be recovered in a civil action.¹

Where it appears by proof satisfactory, to a court or judge, authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is good reason to believe that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or a writ of *certiorari*, the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein, and commanding him to take and forthwith to bring before the court or judge the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof ; if by a judge, it must be under his hand.² And where the proof is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offense, committed in taking or detaining him, the warrant must also contain a direction to arrest that person for the offense.³ The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it ; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of *habeas corpus* had been issued in the first instance.⁴ If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offense, he is entitled to be examined, and must be committed, bailed or discharged, by the court or judge, as in any other criminal case of the same nature.⁵

Return to Either Writ.—The person upon whom either writ has been duly served, must state, plainly and unequivocally, in his return :

1. Whether or not, at the time when the writ was served,

¹ Penal Code, § 380.

² Code Civ. Pro., § 2054.

³ Code Civ. Pro., § 2055.

⁴ Code Civ. Pro., § 2056.

⁵ Code Civ. Pro., § 2057.

or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served; and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate, or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must state the authority and true cause of the imprisonment or restraint, setting it forth at length; and if he was detained by virtue of a mandate, or other written authority, a copy thereof must be annexed to the return unless the original is no longer in his hands, when the substance thereof may be given. If the original mandate or other written authority, for the detention or restraint, is in his hands, it must be produced upon the return of the writ, and exhibited to the court or judge. The return must also state particularly to whom, at what time, for what cause, and by what authority the transfer was made.

The return must be signed by the person making it, and verified by his oath, unless he is a sworn public officer, and makes it in his official capacity.¹

If, in case of *habeas corpus*, the prisoner is so sick or infirm, that the production of him would endanger his life or health, such fact must be stated in the return.²

The return should strictly follow the statutory provisions as to what it shall contain, and will be defective otherwise; thus, if the return should state that the person named, or for whose relief the writ is granted, is not in the custody of the officer served, and fails to state that he is not under his power or restraint.³

Obedience to Writs, etc., Time of Return.—Unless the prisoner is so sick or infirm, that the production of him would endanger his life or his health, the person upon

¹ Code Civ. Pro., § 2026.

² Code Civ. Pro., § 2027.

³ Matter of Stacy, 10 Johns, 328.

whom a writ of *habeas corpus* has been duly served, must bring up the body of the prisoner in his custody, according to the command of the writ.¹ Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as required by statute, the court or judge, before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found ; or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and designated therein ; commanding such officer or other person forthwith to apprehend the delinquent, and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is ; or, if he is a sheriff, in the jail of a county, other than his own, designated in the order ; and in either case without being allowed the liberties of the jail. The order must direct that he stand committed, until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.² The court or judge may also, in its or his discretion, at the time when the warrant of attachment is issued, or afterwards, issue a precept to the sheriff, coroner or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed or remanded, as the court or judge directs.³ The sheriff, coroner or other person, to whom such warrant of attachment or precept is directed, may call to his aid, in the execution thereof, the power of the county, as the sheriff may do, in the execution of a mandate issued from a court of record.⁴

¹ Code Civ. Pro., § 2027.

² Code Civ. Pro., § 2028.

³ Code Civ. Pro., § 2029.

⁴ Code Civ. Pro., § 2030; and see p. 98, *ante*.

A sheriff, coroner, constable or marshal, upon whom complete service of a writ of *habeas corpus* is made, as prescribed, must obey and make return to the writ, according to the exigency thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it, according to the command thereof, without requiring any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.¹ And a person upon whom a writ of *certiorari*, issued as hereinbefore stated, is served, must, in like manner, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant or other process or proceeding to be annexed thereto, obey and return the writ, according to the exigency thereof.²

Where the *habeas corpus* here spoken of, like the *habeas corpus* to testify, is returnable on a day certain, the return must be made at the time and place specified therein; and where it is returnable forthwith, at a place within twenty miles of the place of service, the return must be made, and the prisoner must be produced, within twenty-four hours after service; and the like time must be allowed for each additional twenty miles.³ And if the writ is returnable at a term of court, at a day certain, and the term at such day is adjourned or fails, or the time or place of holding the same is changed, the writ is not thereby rendered void, or is it discontinued or abated; but the return must be made at the time and place to which the term is adjourned or changed, and if the term fails, to the next term, with the same effect as if the term was held as originally appointed.⁴

As before stated, in regard to the writ of *habeas corpus* to testify, in obeying these writs the officer need only look to the writ itself, and if it shows on its face that it was granted by a court or judge having authority so to do, and is authenticated by the seal of the court, he should not hesitate to obey it, and is protected by such writ itself.

In producing the body of the prisoner in obedience to a *habeas corpus*, the officer must strictly obey the writ in so

¹ Code Civ. Pro., § 2004.

² Code Civ. Pro., § 2005.

³ Code Civ. Pro., § 2006.

⁴ Code Civ. Pro., § 44.

doing, and must conduct him to the place designated by the shortest and most convenient route, bearing in mind that the prisoner is still in his custody, notwithstanding the writ, which directs him to do a specific thing with him, and that conduct on his part, touching the liberty of the prisoner, not justifiable as an obedience to the writ, renders him liable for an escape.

Habeas Corpus; Proceedings on Return of.—The court or judge before whom a prisoner is brought on *habeas corpus*, is required to examine into the facts alleged in the return immediately, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint, or for the continuance thereof, is shown; whether the imprisonment was upon a commitment for an actual or supposed criminal matter, or for some other cause.¹

A final order to remand the prisoner must be forthwith made, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.

2. By virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

3. For a criminal contempt, defined in section eight of the Code of Civil Procedure, and specially and plainly charged in a commitment made by a court, officer, or body, having authority to commit for the contempt so charged.²

And the court or judge shall not, upon a return showing a detention for either of the causes just stated, inquire into the legality or justice of any such mandate, judgment, decree or final order, except as above stated,³ for the purpose only of

¹ Code Civ. Pro., § 2031.

³ Code Civ. Pro., § 2034.

² Code Civ. Pro., § 2032.

ascertaining if the case is one properly falling within the provisions of the Code, under which the prisoner is required to be remanded.

In inquiring as to whether the process is valid, the recitals in such process, as to the facts proven, are not to be regarded—the simple question being as to the jurisdiction of the committing court or officer, of the person and subject matter;¹ and inquiry as to the jurisdiction may be made, notwithstanding the recitals.²

If the return shows the prisoner in custody, by virtue of a mandate in a civil cause, he cannot be discharged except in one of the following cases :

1. Where the jurisdiction of the court which, or the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.

2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.³

If it appears that the prisoner has been legally committed for a criminal offense, or if he appears, by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order, to discharge him upon his giving bail, if the case is bailable ; or, if it is not bailable, to remand him. Where bail is given pursuant

¹ *Bennac v. People*, 4 Barb., 31, 35; *People ex rel. Catlin v. Neilson*, 16 Hun, 214, 217.

² *The People v. Cassels*, 5 Hill, 164; *People ex rel. Tweed v. Liscomb*, 60 N. Y., 559.

³ Code Civ. Pro., § 2033.

to such order, the proceedings are the same as upon the return to a writ of *certiorari*, where it appears that the prisoner is entitled to be bailed.¹

A prisoner may, on return of the writ, deny under oath, any material allegation of the return, and make any allegation of fact, showing that he is either imprisoned or detained unlawfully, or is entitled to be discharged; when the court or judge must proceed, in a summary way, to hear the evidence, produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.²

Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody or placed under the restraint, from which he was taken, unless the person, in whose custody or under whose restraint he was, is not lawfully entitled thereto; in which case the order remanding him, must commit him to the custody of the officer or person so entitled.³

Where Prisoner is Sick or Infirm.—Where the return to a writ of *habeas corpus* states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if the writ of *certiorari* had been issued.⁴

Custody of Prisoner Pending Proceeding.—Pending the proceedings on a writ of *habeas corpus*, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody as his age and other circumstances require.⁵

When Notice Required on Return of Habeas Corpus or Certiorari.—Where it appears, from the return of either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made until notice of the time when, and the place where, the writ is returnable,

¹ Code Civ. Pro., § 2035.

⁴ Code Civ. Pro., § 2040.

² Code Civ. Pro., § 2039.

⁵ Code Civ. Pro., § 2037.

³ Code Civ. Pro., § 2036.

or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time as the court or judge prescribes as follows :

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.¹

When Certiorari Issued on Application for Habeas Corpus, and Proceedings Under.—Where it appears to the court or judge, on the petition and documents annexed, upon an application for *habeas corpus*, that the cause or offense for which the party is imprisoned or detained, is not bailable, a writ of *certiorari* may be granted instead of a writ of *habeas corpus*, as if the application had been therefor ;² and upon the return to such writ, the court or judge must proceed as upon a return to a writ of *habeas corpus* ;³ when, if it appears that the prisoner is unlawfully imprisoned or restrained in his liberty, a final order must be made discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, a final order must be made dismissing the proceedings.⁴

Habeas Corpus may Issue on Return of Certiorari, or on Refusal to Discharge Thereunder, or to Grant such Writ.—Notwithstanding a writ of *certiorari* has been issued and returned, the court or judge, before which or whom it is returnable, may issue a writ of *habeas corpus* ; and, if the court or judge refuses a writ of *certiorari*, or, upon the return thereof, refuses to discharge the prisoner, the latter may claim, and is entitled to, the writ of *habeas corpus*.⁵

Proceedings on Return of Certiorari.—Where it appears, upon the return to a writ of *certiorari*, issued as hereinbefore stated, that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; speci-

¹ Code Civ. Pro., § 2038.

² Code Civ. Pro., § 2041.

³ Code Civ. Pro., § 2042.

⁴ Code Civ. Pro., § 2043.

⁵ Code Civ. Pro., § 2044.

fying the court, and the term thereof, at which he is required to appear; and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the Supreme Court, or to the county judge or special county judge of the county, or to a judge of a superior city court of the city where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum fixed, conditioned for the appearance of the prisoner as prescribed in the order. Each person, offering himself as a surety, must show, by his oath, to the satisfaction of the judge, that he is a householder in the county, and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary that the prisoner should appear in person before the judge to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified in like manner as a deed to be recorded in the county.¹ The judge must immediately file the recognizance with the clerk of the court, before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the *certiorari*.²

Final Order to Discharge; Effect of; Enforcement of.—A final order to discharge a prisoner, made as hereinbefore stated, may be served in like manner as an injunction order, and, when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made by the Code of Civil Procedure. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given, as required thereby.³ Obedience to such order may be enforced by the

¹ Code Civ. Pro., § 2045, 2046.

³ Code Civ. Pro., § 2048.

² Code Civ. Pro., § 2047.

court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of *habeas corpus*, and with like effect. A person guilty of disobedience to such order, forfeits, to the prisoner aggrieved, \$1,250 in addition to the damages which the latter sustains.¹

When Discharged on either Writ, not to be Re-Imprisoned.—A prisoner, who has been discharged by a final order, made upon a writ of *habeas corpus* or *certiorari*, issued as prescribed by the article of the Code as given herein, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause in either of the following cases :

1. Where he has been discharged from a commitment on a criminal charge, and is afterwards committed for the same offense, by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offense.

2. Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment ; and is afterwards arrested on sufficient proof, and committed by a lawful mandate, for the same offense.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order or other mandate, as prescribed by the Code ; and is afterwards imprisoned by virtue of a lawful judgment, final order or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest ; and is afterwards taken in execution, or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.² And if a court, or a judge, or any other person, in the execution of a judgment, order or other mandate, or otherwise, knowingly violates, causes to be violated, or assists in the violation of this provision, prohibiting such re-imprisonment after such discharge ; he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits to the prisoner aggrieved

¹ Code Civ. Pro., § 2049.

² Code Civ. Pro., § 2050; *ex parte Jilz*, 64 Mo., 205.

\$1,250, and is also guilty of a misdemeanor; and upon conviction thereof, shall be punished by fine, not exceeding \$1,000, or by imprisonment not exceeding six months, or by both, in the discretion of the court.¹

Bail on Appeal.—Where a prisoner, who stands charged upon a criminal accusation, with a bailable offense, has perfected or intends to take an appeal from a final order dismissing the proceedings, remanding him or otherwise refusing to discharge him, the court or judge upon his application, either before or after the final order, must, upon such notice to the district attorney as the court or judge thinks proper, make an order fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.² The recognizance for that purpose must be conditioned, that the prisoner will appear, at a general term of the appellate court to be held at a time and place designated in the order, and abide by and perform the judgment or order of the appellate court. It must be taken and approved by a justice of the Supreme Court, or by a court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made; or, in the city of New York, by a judge of the court of common pleas for that city and county. In all other respects, the proceedings are the same as where it appears, upon the return of a writ of *certiorari*, that the prisoner is entitled to be admitted to bail.³ Where such prisoner has perfected an appeal, to the Court of Appeals, from a final order of the Supreme Court, or of a superior city court, affirming an order refusing his discharge, or reversing an order granting his discharge; the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail as aforesaid; except that the recognizance must be conditioned to appear, at a general term of the court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal.⁴

¹ Code Civ. Pro., § 2051; Penal Code, § 379.

² Code Civ. Pro., § 2060.

³ Code Civ. Pro., § 2061.

⁴ Code Civ. Pro., § 2062.

Where the sum, in which a prisoner shall be admitted to bail, has been fixed, he must remain in the custody of the sheriff of the county in which he then is, until such bail is given, or until the time to appeal has expired, or the appeal is disposed of, and the further direction of the court made thereupon.¹

Where no order, or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance given as aforesaid, the matter is deemed adjourned without an order to that effect, to the next general term of the same court; or, in the Supreme Court, to the next general term thereof to be held in the same department; and thereafter to each successive general term, until such an order or direction is made. The prisoner is bound to attend at each successive general term; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.²

Must Furnish Copy of Commitment or Authority for Detaining.—An officer or other person, who detains any one by virtue of a mandate, or other written authority, must, upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of *habeas corpus* or a writ of *certiorari* in behalf of the prisoner. If he knowingly refuses so to do, he forfeits \$200 to the prisoner.³

Other Writs of Habeas Corpus.—The provisions of the Code here given, apply to proceedings upon every common law or statutory writ of *habeas corpus*, as far as applicable, unless otherwise expressly prescribed by statute; and the authority of a court or a judge to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to such provisions, in any case therein provided for.⁴

As to Imprisoned Prize Fighters.—Persons imprisoned for failure to give the bond required under the Penal Code in relation to prize-fighting, may, at any time, be discharged upon a writ of *habeas corpus*, upon executing the bond required by the committing magistrate.⁵

¹ Code Civ. Pro., § 2063.

⁴ Code Civ. Pro., § 2066.

² Code Civ. Pro., § 2064.

⁵ Penal Code, § 464.

³ Code Civ. Pro., § 2065.

Children Detained by Shakers.—If, on the return of any writ of *habeas corpus*, issued under the statute providing therefor, in case of a child being detained by its father or mother attached to the society of Shakers, it shall appear that any child therein mentioned cannot be found, and satisfactory proof be made to the officer issuing such writ that such child is secreted or concealed by, or among, any such society, he may issue his warrant, directed to the sheriff of the county where the said child is suspected to be, commanding such sheriff, in the day-time, to search the dwelling-houses and other buildings, of such society, or of any members thereof, or any other building or dwelling-house specified in the warrant, for such child, and to bring him before such officer; and the sheriff shall forthwith execute such warrant.¹

3. *Mandamus and Prohibition.*

Service of Writ.—In regard to special proceedings instituted by these writs, it is only important here to speak of the manner of the service of the writs respectively. The writ of *mandamus* is either alternative or peremptory. The alternative writ is served by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer upon whom a summons, issued out of the Supreme Court, may be served. Where one or more of the persons, upon whom service is required to be made, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon

¹ 3 R. S. (5th ed.), § 242; id. (6th ed.), § 164; id. (7th ed.), § 2341.

him or them, as prescribed by law in such cases, for the service of a summons issued out of the Supreme Court.¹

Where a notice of motion for, or an order to show cause why, a peremptory mandamus should not issue, is required to be served upon a court, board, or other body consisting of three or more members, such notice or order, and the papers, upon which the application is to be made, may be served in the same manner as an alternative writ aforesaid.²

A peremptory writ of mandamus must be personally served, in like manner as a summons issued out of the Supreme Court; and each provision of the Code of Civil Procedure, hereinbefore given, relating to the personal service of a summons upon a defendant, applies to the service of such writ.³

The writ of prohibition must be served in the same manner as an alternative writ of mandamus, and a copy of the papers upon which it was granted must be delivered with each copy of the writ.⁴

4. *Writ of Assessment of Damages.*

This writ was formerly known as the writ *ad quod damnum*, but is now re-christened as above for the benefit of sheriffs and others not conversant with dead languages.⁵

When and by whom Issued.—Whenever the governor of the State is authorized by law to take possession of any real property within the State, for the use of the people of the State, and he cannot agree with the owner or owners thereof for its purchase, he may cause application to be made to the Supreme Court, for a writ of assessment of damages. The attorney-general, or the district attorney of the county in which the real property is situated, must, when so directed, make the application in the governor's name, and conduct the proceedings under the governor's direction. The application for this writ is made at a special term.⁶ When the legislature of the State consents to the taking of any real property within the State for the use of the people of the United States, a writ of assessment of

¹ Code Civ. Pro., § 2071.

² Code Civ. Pro., § 2070.

³ Code Civ. Pro., § 1999; and see p. 192.

⁴ Code Civ. Pro., § 2095.

⁵ Code Civ. Pro., § 2103.

⁶ Code Civ. Pro., §§ 2104, 2105.

damages may be issued. The application for such writ must be made, and the subsequent proceedings conducted by the attorney of the United States, for the district embracing the county wherein the real property is situated; the proceedings thereon are the same, as on such writ upon the application of the governor.¹

To Whom Directed, and Contents of.—The writ must be directed to the sheriff of the county in which the real property to be taken is situated, unless the court directs the damages for the taking to be assessed by a jury of another county; in which case the writ must be issued to the sheriff of the county, from which the jury is directed to be taken.² The writ must describe the real property to be taken, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner, so that it may be ascertained with certainty. It must command the sheriff, to whom it is directed, to inquire, by the oaths of twelve men of his county, qualified to act as trial jurors in a court of record, whether the owner or owners of the real property, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State; and, if so, the amount thereof; and that he return the writ to the Supreme Court, without delay, with the finding of the jury thereupon.³

It must be issued in behalf of the people of the State, and must be under the seal of the court, which may be the seal of the county wherein it is awarded or returnable.⁴

How Executed.—Immediately upon receipt of the writ, the sheriff must give notice of the time and place of the execution thereof, by publishing the notice once in each week, for at least three successive weeks.⁵ He must also notify twelve men of his county, qualified to act as trial jurors in a court of record, to attend at the time and place, and for the purpose specified in the notice. Each juror must be notified, as a juror is notified to attend a term of the circuit court, and upon his failure to attend, when duly notified, his attendance may be compelled by attachment,

¹ Code Civ. Pro., § 2119.

² Code Civ. Pro., § 2106.

³ Code Civ. Pro., §§ 2107, 1511.

⁴ Code Civ. Pro., §§ 1992, 1994.

⁵ Code Civ. Pro., § 2108.

and proceedings may be taken against him, and he may be punished thereupon, by the Supreme Court, as where a juror duly notified, fails to attend at a circuit court.

The sheriff may require the attendance of a talesman, in place of a juror notified and not appearing; or he may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance.¹ When a jury has been procured, before proceeding further, the sheriff must administer to each juror an oath, "that he will diligently inquire concerning the matters specified in the writ, and will give a true verdict, according to the best of his judgment, without favor or partiality."² After being sworn, the jury must view all the real property described in the writ, and consider the value thereof; and may, in the discretion of a majority of them, hear such testimony as may be offered by any person appearing, respecting their value. They must thereupon assess the damages, which the owner or owners of the real property will sustain, by being deprived thereof. When the real property consists of two or more distinct parcels, owned or claimed to be owned by different persons, the jury must assess separately the value of each distinct parcel, if the writ requires them so to do, or if a majority of them think proper so to do. If the jury cannot, after a reasonable time, agree, the sheriff must discharge them, and publish a new notice and procure a new jury. When the jurors have agreed, they must make an inquisition, stating the sum to be paid by the people of the State, for taking each distinct parcel, or the whole as the case requires. The inquisition must be signed by each juror, and by the sheriff; and the sheriff must immediately thereafter file the inquisition and the writ, with his return to the writ, in the office of the clerk of the county in which the real property is situated.³

This inquisition is subsequently either confirmed or set aside; and the court on setting it aside either directs the issuance of another writ, or directs that another inquisition be taken to supply the defects.⁴

¹ Code Civ. Pro., § 2109.

² Code Civ. Pro., § 2100.

³ Code Civ. Pro., § 2111.

⁴ Code Civ. Pro., §§ 2114, 2113.

5. *Writ of Certiorari to Review.*

The writ of *certiorari* here spoken of, is issued to review the determination of a body or officer,¹ not made in any criminal matter, except in a criminal contempt of court.² It is only important here to inquire as to the effect of such writ upon the execution of the determination to be reviewed, and the manner of service of the writ, for it does not otherwise concern a sheriff.

Stay of Proceedings on.—The writ does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed; but the court which grants the writ, may, in its discretion, and upon such terms as to security or otherwise as justice requires, direct, by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the *certiorari*, and until the further direction of the court.

Service of.—The writ must be served, except where different directions, respecting the mode of service thereof, are given by the court granting it, as follows:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the Supreme Court; except as hereinafter specified in the next two subdivisions.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body or upon the members thereof, it may be served in the same manner as an alternative writ of mandamus is served, upon a like board or body, of the service of which we have already spoken.³

¹ Code Civ. Pro., § 2120.

³ Code Civ. Pro., § 2130.

² Code Civ. Pro., § 2148.

SECTION II.

SPECIAL PROCEEDINGS INSTITUTED WITHOUT WRIT.

1. *Insolvent's Discharge.*

An insolvent debtor, discharged from his debts, pursuant to the provisions of article first, title one, chapter seventeen of the Code of Civil Procedure, if under arrest at the time when the discharge is granted, by virtue of an execution against his person issued, or an order of arrest made, in an action or special proceeding, founded upon a debt or liability from which he is discharged, must be released from the arrest, upon producing to the officer his discharge or a certified copy of the record thereof.¹ The discharge is granted by the county court of the county where the debtor resides; or, if he resides in the city of New York, by the court of common pleas in that city and county.²

When Barred.—See subdivision three of this section.

2. *Insolvent Debtor's Exemption from Arrest or Discharge from Imprisonment.*

An insolvent debtor—exempted from arrest or discharged from imprisonment, pursuant to the provisions of article second, title one, chapter seventeen, of the Code of Civil Procedure—if imprisoned at the time when the discharge is granted, by virtue of an execution against his person issued, or of an order of arrest made, in an action or special proceeding founded upon a debt, liability or judgment, as to which he is exempted from arrest or imprisonment by said discharge, must forthwith be released on production of the discharge, or a certified copy of the record thereof;³ and a person who has been admitted to the jail liberties, is deemed to be imprisoned.⁴ This discharge is granted by the county court of the county in which the debtor resides or is imprisoned; or, if he resides or is imprisoned in the city of New York, by the court of common pleas of that city and county.⁵

¹ Code Civ. Pro., § 2185.

² Code Civ. Pro., § 2150.

³ Code Civ. Pro., § 2197.

⁴ Code Civ. Pro., § 2188.

⁵ Code Civ. Pro., § 2188.

Such discharge also forever thereafter exempts such debtor from arrest or imprisonment, by reason of any debt due at the time of making the assignment in said article provided for, or contracted before that time, though payable afterwards; or by reason of any liability incurred by him by making or indorsing a promissory note, or by accepting, drawing or indorsing a bill of exchange, before the execution of such assignment; or in consequence of the payment, by any party, to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment, except, however, it be one of the debts named in the next paragraph. (As to the requisites making such discharge a protection, see *post*).

When not Exempt, and not to be Discharged.—The debtor is not exempted, by such discharge, from arrest or imprisonment, and consequently is not entitled to discharge from imprisonment, on account of a debt or duty owing to the United States; or a debt or duty owing to the State, for taxes or for money received or collected by any person, as a public officer, or in a fiduciary capacity; or a cause of action or judgment thereon, either for the recovery of the same, or damages for, without right obtaining, receiving, paying, converting or disposing of, or converting and disposing of, any money, funds, credits, or other property, held or owned by the State, or held or owned officially or otherwise, for or on behalf of a governmental or other public interest by a domestic municipal or other public corporation, or by a board, officer, custodian, agency or agent of the State, or of a city, county, town, village, or other division, subdivision, department or portion of the State.¹

As to Debtor's Property.—A debt, demand, judgment or decree against an insolvent, discharged as aforesaid, is not affected or impaired by the discharge; but it remains valid and effectual, against all his property, acquired after the execution of the assignment. The lien, acquired by or under a judgment or decree, upon any property of the insolvent, is not affected by such discharge.²

¹ Code Civ. Pro., §§ 2195, 2218, 1969.

² Code Civ. Pro., § 2199.

3. *Discharge of Imprisoned Judgment Debtor from Imprisonment.*

A person imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment by the court from which the execution issued ; or by the county court of the county in which he is imprisoned ; or, if he is imprisoned in the city of New York, by the court of common pleas for that city and county. Application for such discharge must be made by petition to either of said courts. A person who has been admitted to the jail limits is deemed to be imprisoned.¹

When Petition may be Made.—A person so imprisoned may petition for discharge, at any time, unless the sum, or, where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds \$500, in which case he cannot present such a petition, until he has been imprisoned, by virtue of the execution or executions, for at least three months.²

Proceedings on Petition.—It is not important, so far as the duties of the sheriff are concerned, to point out all the requirements of the Code upon these proceedings, as they must necessarily be conducted by an attorney. Upon the presentation of the petition, and other requisite papers, with proof of the service, notice, etc., as required, the court must make an order directing the petitioner to be brought before it, on a day designated therein ; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the proofs of the parties ; whereupon the court, if satisfied that the petition and the schedule accompanying are correct, and that the petitioner's proceedings are just and fair, must make an order directing the petitioner to execute, to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution, or of so much thereof as is sufficient to satisfy the execution or executions by virtue of which he is imprisoned.³

When Discharge Granted ; Duty of Sheriff Under.—Upon the production, by the petitioner, of satisfactory evi-

¹ Code Civ. Pro., § 2200, 2201.

² Code Civ. Pro., § 2208.

³ Code Civ. Pro., § 2202.

dence, that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the petitioner's giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution specified in his petition. The sheriff, upon being served with a certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.¹

When Discharge a Protection to Sheriff.—The discharge here spoken of, as well as the discharge under subdivisions one and two of this section respectively, is a full protection to the sheriff for a release of the debtor, where it shows by the recitals therein all the facts necessary to give jurisdiction to the officer granting it, assuming of course, that it is granted by the proper officer; if it should not contain such recitals, the sheriff is still protected if he can show the existence of such facts.²

Effect of Discharge as to Property.—The judgment creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment which he had before the execution was issued.³

Not to be Re-imprisoned, except, etc.—After such discharge, the petitioner shall not be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereon, unless he be convicted of perjury, committed in any of the proceedings upon his petition for discharge, in which case any judgment creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.⁴

Who not Entitled to Discharge.—Neither of the following named persons shall be discharged from imprisonment under the provisions of the Code here treated of:

1. A person owing a debt or duty to the United States.
2. A person owing a debt or duty to the State, for taxes

¹ Code Civ. Pro., § 2212.

² *Develin et al. v. Cooper*, 84 N. Y., 410, 414; *Bullymore v. Cooper*, 46 N. Y., 236.

³ Code Civ. Pro., § 2213.

⁴ Code Civ. Pro., §§ 2213, 2214.

or for money received or collected by any person, as a public officer or in a fiduciary capacity, or a cause of action specified in section 1969 of the Code of Civil Procedure, or a judgment recovered upon such a cause of action.¹

The following is the section of the Code of Civil Procedure referred to :

“§ 1969. Where any money, funds, credits or other property, held or owned by the State, or held or owned, officially or otherwise, for or on behalf of a governmental or other public interest, by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency or agent of the State, or of a city, county, town, village or other division, subdivision, department, or portion of the State, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages, or other compensation, for so obtaining, receiving, paying, converting or disposing of the same, or both, may be maintained by the people of the State, in any court of the State having jurisdiction thereof, although a right of action, for the same cause, exists by law in some other public authority, and whether an action therefor, in favor of the latter, is or is not pending, when the action in favor of the people is commenced.”

When Barred from Discharge.—Where a person has been imprisoned, by virtue of an execution, for the space of three months after he was entitled, by the provisions of the Code of Civil Procedure here referred to, to apply for a discharge; and has neither made such an application, nor applied for his discharge under the provisions spoken of in subdivision one of this section, as an insolvent debtor; the judgment creditor, by virtue of whose execution he is imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions here treated.² If the prisoner does not, within thirty days after personal service of such a notice, either present a petition to the proper court, in proceedings mentioned in subdivision one of this section, or serve upon the creditor giving the notice a copy of a petition and schedule, with a notice of his intention to apply for his discharge,

¹ Code Civ. Pro., § 2218.

² Code Civ. Pro., § 2216.

under the provisions last herein spoken of ; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions spoken of under subdivision one of this section, or under the provisions just treated.¹

4. *Summary Proceedings to Recover Possession of Land.*

In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house or other dwelling, and his assigns, under-tenants or legal representatives, may be removed therefrom as prescribed in title two of chapter seventeen of the Code of Civil Procedure :

1. Where he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without the permission of the landlord.

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in said title, and hereinafter given, for the service of a precept.

3. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

4. Where the demised premises, or any part thereof, are used or occupied as a bawdy-house, or house of assignation for lewd persons, or for any illegal trade or manufacture, or other illegal business.²

In either of the following cases, a person who holds over and continues in possession of real property, and his assigns, tenants or legal representatives, after notice in behalf of the

¹ Code Civ. Pro., § 2217.

² Code Civ., Pro., § 2231.

applicant, requiring all persons occupying the property to quit the same, by a day therein specified, has been either personally served upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein; may be removed therefrom, as prescribed in said title :

1. Where the property has been sold by virtue of an execution against him, or a person under whom he claims, and a title under the sale has been perfected.

2. Where the property has been duly sold upon the foreclosure, by advertisement, of a mortgage executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where he occupies or holds the property, under an agreement with the owner, to occupy and cultivate it upon shares, or for a share of the crops, and the time, fixed in the agreement for his occupancy, has expired.

4. Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, a parcel of land, in a city or incorporated village, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter ; or after a permission given by him has been revoked, and notice of the revocation given to the person or person to be removed.¹

It is also provided by the Code that an entry shall not be made into real property, but in a case where entry is given by law ; and, in such a case, only in a peaceable manner—not with strong hand nor with multitude of people ; and a person who makes a forcible entry forbidden as aforesaid, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, under-tenants and legal representatives may be removed therefrom, as prescribed in the aforesaid title.²

It is important for the sheriff to know in what cases these proceedings may be instituted, only, that he may, when a warrant for dispossession is given to him for execution, know whether the judge, justice or officer had jurisdiction ; and we have given the only cases in which these proceedings are authorized.

¹ Code Civ. Pro., § 2232.

² Code Civ. Pro., § 2233.

Courts and Officers Having Jurisdiction.—Application for the removal of a person from real property in the cases aforesaid, may be made to the county judge or special county judge of the county, or a justice of the peace of the city or town, or the mayor or recorder of the city, wherein the real property, or a portion thereof, is situated. Application may also be made if the property, or a portion thereof, is situated in the city of New York, to a justice of the marine court of that city, or to the district court of the district within which the property, or a portion thereof, is situated; if, in the city of Brooklyn, to a police justice of that city; if, in the city of Albany, or the city of Troy, to a justice of the justice's court of that city; if, in the city of Yonkers, to the city judge of that city; if, in the cities of Rochester or Buffalo, to a judge of the municipal court of that city. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town who keeps an office in the village.¹

It is important for the sheriff to know that the proceedings are instituted by the proper judge, justice or officer, for otherwise no jurisdiction can be acquired.

Application by Whom, and How.—The application may be made by the landlord or lessor of the demised premises; the purchaser upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply.²

An owner or tenant of real property, in the immediate neighborhood of other demised real property, which is used or occupied as a bawdy-house, or house of assignation for lewd persons, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make

¹ Code Civ. Pro., § 2234.

² Code Civ. Pro., § 2235.

an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such an application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it, the person giving the notice may make such application, stating in his petition the facts so entitling him to make it.¹

The application is made by petition, verified in like manner as a complaint in an action in the Supreme Court, describing the premises, and stating the facts authorizing the application, and the removal of the person in possession; naming or otherwise intelligibly designating the person or persons against whom the proceeding is instituted; specifying, if there be two or more, who are principals or tenants, and who are under-tenants or assigns, and praying for a final order for removal.²

Service of Precept.—On presentation of the proper petition to the proper judge, justice or officer, a precept is issued.³ Where the application is made in the city of New York to a district court, the petition is filed with and the precept issued by the clerk of the court.⁴

The precept must be served as follows:

1. By delivering to the person to whom it is directed, or if it is directed to a corporation, to an officer of the corporation upon whom a summons, issued out of the Supreme Court, in an action against the corporation, might be served a copy of the precept, and at the same time showing him the original.

2. If the person to whom the precept is directed resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof at his dwelling-house to a person of suitable age and discretion, who resides there; or, if no such person can with reasonable diligence be found there, upon whom to make service, then by delivering a copy of the precept, at the property sought to be recovered, either to some person of suitable age and discretion residing there;

¹ Code Civ. Pro., § 2237.

² Code Civ. Pro., § 2235.

³ Code Civ. Pro., § 2238.

⁴ Code Civ. Pro., § 2239; N. Y. City Consol. Act of 1882, § 1358.

or, if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions, by affixing a copy of the precept upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case it must be served at least two days before the day on which it is returnable.¹

When issued by the district court of the city of New York, service must be made by a city marshal, unless some other person is appointed specially.²

A copy of the following section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed:

“§ 2241. A person, to whom a copy of a precept, directed to another, is delivered as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city.

A person who willfully violates any provision of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.”

In the case of bawdy houses, or houses of assignation for lewd persons, the precept must be directed to and served

¹ Code Civ. Pro., § 2240.

² N. Y. City Consol. Act 1882, §§ 1357, 1301.

upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property.¹

Proof of Service.—Unless the adverse party appears, due proof of the service of the precept must be made at the time when it is returnable, showing the time, place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where service is made by a sheriff, constable or marshal, it may be proved by his certificate, stating the facts.²

Where the precept is returnable on the same day it issues, the exact time of service should be shown by the proof that it may appear to have been served at least two hours before its return.

Although the service should be proven by an affidavit or certificate, still, proof may be made orally; and the affidavit or certificate may be taken, together with oral testimony to establish the fact of a proper service.³

Where there is more than one person to whom the precept is directed, the proof should show service on each, and is otherwise defective.⁴

Jury.—After the joining of issue, either party may demand a trial by jury, and upon payment of the necessary costs and expenses of obtaining the same, the judge or justice shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, and shall issue his precept, directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such judge or justice at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purposes of trying the said matters in difference. From this panel six jurors are drawn, in the same manner as jurors in justices' courts. After hearing the allegations and proofs of the parties, the jury shall be

¹ Code Civ. Pro., § 2242.

² Code Civ. Pro., § 2243; *People ex rel. Hughes v. Lamb*, 10 Hun, 348.

³ *Robinson v. McManus*, 4 Lans., 380.

⁴ *People ex rel. Crawford, v. Decamp*, 12 Hun, 378.

kept together, until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury as is usual in like cases in courts of record. Where the jury disagree and are discharged, a new jury may be nominated and a new precept therefor be issued in manner aforesaid.¹

Final Order.—The final order, if in favor of the petitioner, must award to him the delivery of the possession of the property; except in cases of bawdy-houses or houses of assignation for lewd persons, where the final order must direct the removal of the occupant. Where the verdict or decision is in favor of the person answering, there must be a final order according thereto. The order awards costs to the party in whose favor it is.²

If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon, as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case an execution may be issued to collect the costs awarded thereby, as if the final order was a judgment, rendered in the court of which the judge or justice is the presiding officer.³

Warrant and Execution of.—Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant, under his hand, directed to the sheriff of the county, or to any constable or marshal of the city in which the property or a portion thereof is situated; or if it is not situated in a city, to any constable of any town in the county, describing the property, and commanding the officer to remove all persons therefrom; and also, except in the cases before mentioned, of bawdy-houses, or houses of assignation for lewd persons, to put the petitioner into the full possession thereof.⁴

The officer, to whom the warrant is directed and delivered, must execute it according to the command thereof, between the hours of sunrise and sunset.⁵

¹ Code Civ. Pro., § 2247.

⁴ Code Civ. Pro., § 2251.

² Code Civ. Pro., § 2249.

⁵ Code Civ. Pro., § 2252.

³ Code Civ. Pro., § 2250.

When and how Issuing of a Warrant may be Stayed. — The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also stay an execution to collect the costs as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, he may effect a stay by payment of the rent due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent and costs, within ten days; at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

2. When the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a bankrupt, he may effect a stay by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent of the premises, as it has become or thereafter becomes due.

3. Where the final order establishes that the person, against whom it is made, continues in possession of real property which has been sold by virtue of an execution against his property, he may effect a stay by paying the costs of the special proceeding, and delivering to the judge or justice, or the clerk of the court, an affidavit that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect that he will pay any costs and damages which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner, within six months thereafter; and that he will not commit any waste upon, or injury to, the property during his occupation thereof.¹

¹ Code Civ. Pro., § 2254.

Stay on Appeal.—Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in the payment of rent, the issuing and execution of the warrant may, except in the city and county of New York, be stayed by the order of the county judge. Such an order can be made only upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from, and also an undertaking to the petitioner, in a sum, and with sureties, approved by the county judge, to the effect that if, upon the appeal, a final determination is rendered against the appellant, he will pay all rent accruing or to accrue upon the premises; or, if there is no lease thereof, the value of the use and occupation of the premises, subsequent to the institution of the special proceeding.¹

Stay by Injunction, etc.—Where a petition is presented in these proceedings, the proceedings thereupon before the final order, and, if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon cannot be stayed or suspended by any court or judge, except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose.

2. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings in an action of ejectment, brought by the petitioner, and upon the like terms; or after the final order, except in a case where an injunction would be granted, to stay the execution of the final judgment in such an action, and upon the like terms.²

Restitution.—If, upon an appeal, the final order in these proceedings is reversed, the appellate court may award restitution to the party injured, with costs; and it may make any order, or issue any other mandate, necessary to carry

¹ Code Civ. Pro., § 2262.

² Code Civ. Pro., § 2265.

its determination into effect. An action for damages may be also maintained by the dispossessed person.¹

In New York City.—In this city no monthly tenant can be removed from any lands or tenements, on the grounds of holding over his term, unless the term expires on the first day of May, if the landlord or his agent has not, at least five days before the expiration of the term, served upon the tenant in the same manner in which a precept is allowed to be served as aforesaid, a notice in writing to the effect that the landlord elects to terminate the tenancy, and will commence summary proceedings under the statute to remove him, unless he removes from the premises on the day on which his term expires.²

5. *Contempts, other than Criminal.*

These proceedings are for the protection of the rights of parties in civil actions or special proceedings. Criminal contempts will be spoken of in another place.

What are, Power to Punish for.—A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty or other misconduct, by which a right or remedy of a party to a civil action or special proceeding pending in the court, may be defeated, impaired, impeded or prejudiced, in either of the following cases:

1. An attorney, counsellor, clerk, sheriff, coroner or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counsellor or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where, by law, execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

¹ Code Civ. Pro., § 2263.

² Laws 1882, chap. 303.

4. A person for assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority ; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court ; for unlawfully detaining, or fraudulently and willfully preventing, or disabling from attending or testifying, a witness or a party to the action or special proceeding, while going to, remaining at or returning from, the sitting where it is noticed for trial or hearing ; and for any other unlawful interference with the proceedings therein.

5. A person subpœnaed as a witness, for refusing or neglecting to obey the subpœna, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding ; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter which has been removed from his jurisdiction to the court inflicting the punishment ; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment or any other proceeding to punish for contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.¹

In the cases just specified, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct ; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, im-

¹ Code Civ. Pro., § 14.

paired, impeded, or prejudiced thereby, the offense must be punished as herein pointed out.¹

When Punishment may be Summary.—Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge or referee, stating the facts which constitute the offense, and showing that the offense was committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, and plainly and specifically prescribing the punishment to be inflicted therefor.²

Warrant to Commit without Notice.—Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue without notice, a warrant to commit the offender to prison until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.³ The willful refusal of a receiver to obey an order of the court, requiring a payment by him out of funds in his hands as receiver, comes within the provisions of the Revised Statutes relating to “proceedings for contempt,” and is not within the above provisions of the Code. Such disobedience is a “misbehavior in his office, and a willful neglect of duty therein.”⁴

Order to Show Cause or Warrant of Attachment.—The court or judge authorized to punish for the offense, *may*, in its or his discretion, where the case is one of those specified in the last two subdivisions, and, in every other case *must*, upon being satisfied, by affidavit, of the commission of the offense, either,

1. Make an order requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or,

¹ Code Civ. Pro., § 2266.

² Code Civ. Pro., § 2267.

³ Code Civ. Pro., § 2268.

⁴ Clark v. Bininger, 75 N. Y., 344.

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.¹

When such order to show cause, or warrant, is returnable before the court, it may be made or issued by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court at which a contested motion may be heard.²

Such order to show cause may be made, or such warrant may be issued, by a referee appointed by the court, where the offense is committed upon the trial of an issue referred to him, or consists of a witness's non-attendance or refusal to be sworn or to testify before him. The order or warrant may, in the discretion of the referee, be made returnable before him, or before the court. Where it is made returnable before the referee, he has all the power and authority of the court, with respect to the motion or special proceeding instituted thereby.³

In Case of Delinquent Officer.—Where it is prescribed by law, or by the general rules of practice, that a notice may be served in behalf of a party, upon a sheriff or other person, requiring him to return a mandate delivered to him, or to show cause, at a term of a court, why he should not be punished, or why an attachment should not be issued against him for a contempt of the court; the party in whose behalf the notice is served may, at the time specified therein, file with the clerk, proof by affidavit or other written evidence of the delivery of the mandate to the accused; of the default or other act, upon the occurrence of which he was entitled to serve the notice; of the service of the notice; and of the failure to comply therewith; thereupon the proceedings are the same as where an order to show cause is made, and it, and a copy of the affidavits upon which it is granted, are served upon the accused.⁴

¹ Code Civ. Pro., § 2269.

³ Code Civ. Pro., § 2272.

² Code Civ. Pro., § 2271.

⁴ Code Civ. Pro., § 2270.

Rule sixth of the Supreme Court provides that at any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process, or other paper, by the provisions of the Code of Civil Procedure or by the said rules, any party entitled to have such act done, may serve on the officer a notice to return, deliver, or file such process, or other paper, as the case may be, within ten days, or show cause, at a special term, to be designated in said notice, why an attachment should not issue against him.¹

A sheriff may, at the time and place specified in such notice, present any valid excuse whereby he was not required by law to return, deliver or file such process, or whereby it was impossible for him so to do. If the statute of limitations is a bar to an action for the neglect complained of, it will also be an answer to such application for an attachment.² The manner of making answer is hereinafter stated.

Effect of Order and Warrant.—The order to show cause may be made, before or after final judgment in the action, or the final order in a special proceeding, and is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein.

The warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant.³

Indorsement on the Warrant; Undertaking.—The court, judge or referee, issuing a warrant of attachment, may, in its or his discretion, by an indorsement thereupon, fix a sum in which the accused may give an undertaking for his appearance to answer; in which case the accused, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear at the time when, and the place where, the warrant is returnable, and then

¹ Rule 6, Sup. Ct.

² *People v. Everest*, 4 Hill, 71; *Van Tassel v. Van Tassel*, 31 Barb., 439; *People v. Brotherson*, 36 id., 662.

³ Code Civ. Pro., § 2273.

⁴ Code Civ. Pro., § 2275.

and there abide the direction of the court, judge or referee, as the case requires, must be discharged from arrest. The officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties, concerning their property and circumstances.¹ Such undertaking must be filed by the sheriff, or other officer, with his return to the warrant, and, in case of a *habeas corpus*, with his return to such writ.²

Execution of Warrant.—A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof.³

Where there is no indorsement on the warrant as above provided; or, where there is such indorsement, and an undertaking is not given as above provided; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case the sheriff must produce him, as directed by the court, judge or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.⁴

When Habeas Corpus may Issue.—If the accused is in the custody of a sheriff or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case the court, upon proof of the facts, must issue a writ of *habeas corpus*, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would

¹ Code Civ. Pro., § 2277.

² Code Civ. Pro., § 2279.

³ Code Civ. Pro., § 2274.

⁴ Code Civ. Pro., § 2276.

be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.¹

Proceedings on Return.—When the accused is produced on warrant of *habeas corpus*, or appears on a warrant, the court, judge or referee must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge or referee allows therefor; and either party may produce affidavits or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers and subsequent proofs, the court, judge or referee must determine whether the accused has committed the offense charged.²

On the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and a certified copy of the order made is sufficient, without further process, upon which to commit the offender.³ No interrogatories are required where the proceeding is instituted by order to show cause.⁴

Punishment.—If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court or before the judge or referee; the court, judge or referee must make a final order accordingly, and directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly.⁵ Where the accused is brought up by virtue of a writ of *habeas corpus*, he must, after the final order is made, be remanded to the custody of the sheriff or other officer to whom the writ was directed; and if such order directs that he be punished by imprisonment, or committed until the payment of a sum of

¹ Code Civ. Pro., § 2278.

² Code Civ. Pro., § 2280.

³ Code Civ. Pro., § 2283.

⁴ *Mayor, etc. v. N. Y. and S. I. F. Co.*, 64 N. Y., 622; *Albany City Bank v. Schermerhorn*, 9 Paige, 373.

⁵ Code Civ. Pro., § 2281.

money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff or other officer.¹

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine sufficient to indemnify the aggrieved party must be imposed upon the offender, and collected and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitutes a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and \$250 in addition thereto, and must be collected and paid in like manner. A corporation may be fined as here provided.²

Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid.

In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment.³

When may be Released.—Where an offender, imprisoned as prescribed above, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge or referee, or, where the commitment was made in proceedings supplementary to execu-

¹ Code Civ. Pro., § 2282.

³ Code Civ. Pro., § 2285.

² Code Civ. Pro., § 2284.

tion, the court out of which the execution issued, may, in its or his discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment.¹

Misconduct at Circuit.—Where a misconduct, which is punishable by fine or imprisonment under the foregoing provisions, occurs at a term of a circuit court, or with respect to a mandate returnable at a term of that court, or a special proceeding pending in that court, and was not punished at that term of the circuit court; the Supreme Court may inquire into and punish the misconduct, as if it had occurred at special term of the Supreme Court held in the same county, or with respect to a mandate returnable at such a special term, or a special proceeding pending in the Supreme court.²

Proceedings on Undertaking.—Where a person arrested, by virtue of a warrant of attachment, has given an undertaking for his appearance, and fails to appear on the return day of the warrant, the court may either issue another warrant, or make an order, directing the undertaking to be prosecuted, or both.³ Such order may, in the discretion of the court, direct the prosecution thereof, by and in the name of any party aggrieved by the misconduct of the accused; or, if no party is aggrieved, the bidder must, and in case where the court thinks proper so to direct, it may, direct the prosecution by the attorney-general, or by the district attorney of the county in which it was given, in the name of the people.⁴

After the return of an execution, issued upon a judgment rendered in an action upon the undertaking, an action to recover the amount of the judgment may be maintained against the sheriff, where it appears that, at the time when the undertaking was given, the sureties were insufficient, and the sheriff had reasonable grounds to doubt their sufficiency. Such action may be maintained by the plaintiff, in whose favor the judgment was recovered.⁵

Against Sheriff for not Returning Execution.—When

¹ Code Civ. Pro., § 2286.

² Code Civ. Pro., § 2292.

³ Code Civ. Pro., § 2288.

⁴ Code Civ. Pro., § 2289.

⁵ Code Civ. Pro., § 2290.

⁶ Code Civ. Pro., § 2291.

these proceedings are had against a sheriff for failure to return an execution, he should, at the time of the making of the final order imposing a fine, if such an order be made, endeavor to have the order made conditional, or in such manner that he may, in effect, be subrogated to the plaintiff's right in the judgment; otherwise, where he is fined the amount of the judgment, he cannot afterwards enforce the judgment for his own benefit by assignment, or otherwise, as the payment of the fine is a satisfaction of the judgment, unless the order makes some provision by which the ordinary effect of such an order, and payment of fine thereunder, is modified for the benefit of the sheriff.¹

6. *Proceedings to Collect a Fine.*

Schedule of.—Where a fine has been imposed by a court of record upon a grand or trial juror, or upon any officer or other person, without being accompanied with an order for the immediate commitment of the person so fined, until the fine is paid, the clerk of the court, immediately after the close of the term at which the fine was imposed, must prepare a schedule, containing, in separate columns, the following matters:

1. The name of each person fined.
2. His place of residence where it appears, from the papers on file or before the court, to be within the county.
3. The amount of the fine imposed upon him.
4. The cause for which the fine was imposed.

The clerk must subjoin to the schedule a certificate, to the effect that it contains a true abstract of the orders imposing fines, and must annex it to the warrant for the collection.²

There must be included also, in the schedule, the name of each person who has been fined, prior to the issuing of the warrant, and whose fine then remains wholly or partly unpaid, and not remitted by the court.³

Warrant for Collection.—Immediately after the close of the term at which the fine was imposed, the clerk must issue a warrant, under the seal of the court, directed to the

¹ *Carpenter v. Stilwell*, 11 N. Y., 61.

³ Code Civ. Pro., § 2299.

² Code Civ. Pro., § 2293.

sheriff of the county, and annexed to the schedule aforesaid, commanding him to collect from each of the persons named in the schedule, the sum therein set opposite that person's name; and to pay over the sum collected to the treasurer of the county. Such warrant is the process of the court imposing the fines.¹

Where the person fined resides in another county, a separate warrant, with an appropriate schedule annexed, must in like manner be issued to the sheriff of the county where such person resides, for the collection of the fine imposed.²

Execution and Return of Warrant.—The sheriff to whom such warrant is issued, must collect each fine out of the personal property of the person fined, in the same manner prescribed for the collection, by levy upon and sale of personal property, of an execution issued out of a court of record. If sufficient personal property cannot be found to pay the fine and the sheriff's fees, the sheriff must arrest the delinquent, and detain him in custody until he pays the same, as upon an execution against the person, issued in an action in the Supreme Court. The sheriff is entitled to the same fees on the warrant, as upon an execution aforesaid.³

The sheriff must return the warrant with his proceedings thereupon, at the term of the court; or, where the fine was imposed, in any county except New York, by the Supreme Court, the circuit court, the Court of Oyer and Terminer, or the court of sessions, at the term of the county court; held next after the expiration of sixty days from the receipt thereof. If he fails so to do, the district attorney must take the same proceedings to compel a return, as may be taken by a judgment creditor, where a sheriff omits to return an execution issued out of the Supreme Court.⁴

When Uncollected, new Warrant, Liability of Sheriff, etc.—Where it appears by the return that a fine remains uncollected, and it does not appear that the sheriff has the delinquent in custody, the district attorney must, if he has good reason to believe that the sheriff might, with due diligence, have collected the fine, or arrested and detained the delinquent, commence an action against the sheriff in the

¹ Code Civ. Pro., § 2294.

² Code Civ. Pro., § 2295.

³ Code Civ. Pro., § 2296.

⁴ Code Civ. Pro., § 2297.

name of the people. Otherwise he must direct the clerk to issue a new warrant, or to include the fine in the schedule annexed to the next warrant to be issued by him. A new warrant may from time to time be issued, or the fine may be included in the schedule annexed to a subsequent warrant until it is collected.¹

An action may be maintained in behalf of the people, against a sheriff, to whom a warrant is directed to be delivered as hereinbefore stated, to recover damages for any omission of duty with respect to the same, in case where a judgment creditor might maintain an action against a sheriff, to whom an execution issued out of the Supreme Court is directed and delivered. In such an action the people are entitled to recover the same damages, which a judgment creditor would be entitled to recover, if the order imposing the fine was a judgment of the Supreme Court.²

When Foregoing not Applicable.—Where special provision is otherwise made by law for the collection of a fine, the foregoing provisions are not applicable.³

(For collection of fines against jurors in New York county, *see ante page 74.*) In Kings County fines against jurors are collected by the commissioner of jurors.

7. *Proceedings for the Appointment of a Committee, etc., of a Lunatic, Idiot, or Habitual Drunkard.*

The only duty of sheriff's in these proceedings is in regard to the jury,

Where the questions of fact arising, upon the competency of the person, with respect to whom the appointment of a committee is asked, are not ordered to be tried by a jury, at a trial term of the court—in which case it is tried like any other question of fact, and no peculiar duties devolve upon the sheriff—the court to whom the petition is presented, which may be the Supreme Court, a county court, or superior city court, orders that a commission issue, and this commission directs the commissioners therein named to cause the sheriff of a county, therein specified, to procure a jury.⁴

¹ Code Civ. Pro., § 2298.

² Code Civ. Pro., § 2300.

³ Code Civ. Pro., § 2301.

⁴ Code Civ. Pro., §§ 2327, 2328.

The commissioners, or a majority of them, must immediately issue a precept to the sheriff designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the court in which the proceedings are instituted, to appear, before the commissioners, at a specified time and place, within the county, to make inquiry as commanded by the commission. Upon receiving such precept the sheriff must notify the jurors accordingly; and must return the precept, and the names of the persons notified, to the commissioners, at the time and place specified.¹

The duty of selecting a jury is imposed upon the sheriff, and he should exercise his own judgment in so doing, and not permit any one to furnish him a list of jurors.

The time and mode of summoning the jurors is not particularly pointed out; and, although a written notice might be the best, especially in case of a proceeding for contempt for failure to attend, still, a verbal notification to appear before the commissioners, at a specified time and place, to make inquiry, as by the commission commanded, would be a full compliance with the statute; and such notification, given a reasonable time before the time specified for the attendance of the juror, would be sufficient.

Upon failure to attend, when duly notified, a juror's attendance may be compelled; and he may be punished by the court for a contempt, in the same manner as where a juror fails, when duly notified, to attend at a circuit court, or a trial term of the court.²

The commissioners may require the sheriff to cause a talesman to attend, in place of a juror notified, and not attending, or who is excused or discharged; but twelve jurors attending, and being sworn, are sufficient.³

Where twelve jurors do not concur in the finding, the commissioners must discharge them and issue a new precept to the sheriff, who must thereupon procure another jury.⁴

The sheriff should, and, if directed by the commissioners,

¹ Code Civ. Pro., § 2330.

² Code Civ. Pro., § 2330.

³ Code Civ. Pro., §§ 2330, 2331.

⁴ Code Civ. Pro., § 2331.

must, attend the hearing, and take charge of the jury upon their deliberation ;¹ but should not himself, nor should he allow any one else, to be present during their deliberation ; and for a willful neglect to obey a direction to attend the jury as aforesaid, or for any misconduct, while attending the jury, by which a right or remedy of a party to the proceeding may be impaired or prejudiced, he must be fined by the commissioners, in a sum not exceeding twenty-five dollars.²

The jurors are entitled to the same compensation for their services, as jurors upon the trial of an issue in an action in the same court ; and the petitioner must pay the jurors and sheriff's fees, as well as the commissioner's compensation.³

8. Proceedings Supplementary to an Execution against Property.

Under this head there are three distinct remedies, each of which is a special proceeding, viz. :

1. A proceeding instituted by an order, or a warrant, issued against a judgment debtor, *after* the return of an execution.

2. A proceeding instituted by an order, or a warrant, issued against a judgment debtor, after the issuing and *before* the return of an execution.

3. A proceeding instituted by an order, either *before or after* the return, of an execution, against a person who has property of the judgment debtor, or is indebted to him.

The proceeding under subdivision third, against a person who has property of, or is indebted to the judgment debtor, may be pursued, either alone, or simultaneously, with the proceedings, under either subdivision first or subdivision second.⁴

Before what Judge Instituted.—Either of these proceedings may be instituted before a judge of the court out of which the execution issued, or before the county judge, or special county judge, to which it was issued ; or where it was issued to the city and county of New York, from an inferior court other than the marine court of that city,

¹ Code Civ. Pro., § 1196.

² Code Civ. Pro., § 1196.

³ Code Civ. Pro., § 2333.

⁴ Code Civ. Pro., §§ 2432, 2433.

before a judge of the court of common pleas for that city and county. Where the execution was issued out of a court other than the Supreme Court, and it is shown by affidavit that each of the judges, before whom the special proceedings might be instituted as just mentioned, is absent from the county, or is, for any reason, unable or disqualified to act, the proceeding may be instituted before a justice of the Supreme Court; in which case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made, or warrant issued, by him must be returnable to a justice of the Supreme Court residing in that district, or the county judge, or the special county judge, of that or an adjoining county, as directed in the order or warrant.¹

What Judgment and Execution Necessary to Sustain Proceedings.—Neither of the proceedings here spoken of can be maintained by a judgment creditor, unless his judgment was obtained upon the personal appearance of the judgment debtor, or personal service on him of the summons, for a sum not less than twenty five dollars; and an execution has been issued thereon, out of a court of record, either—

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceeding, a place for the regular transaction of business in person; or,

2. If the judgment debtor is then a resident of the State, to the sheriff of the county where he resides; or,

3. If he is not then a resident of the State, to the sheriff of the county where the judgment roll is filed; unless the execution was issued out of a court, other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.²

Order to Examine Judgment Debtor after Return of Execution.—At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property issued upon a judgment, as prescribed in section 2458 of the Code of Civil Procedure (which has just been given), the judgment creditor, upon proof of the facts, by affidavit,

¹ Code Civ. Pro., § 2434; and see N. Y. city Consol. Act, 1882, § 1168.

² Code Civ. Pro., § 2458.

or other competent written evidence, is entitled to an order, requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.¹

Order to Examine Judgment Debtor Before Return of Execution.—At any time after the issuing of an execution against property, as prescribed in said section 2458, and before the return thereof, the judgment creditor, upon proof, by affidavit, or other competent written evidence, that the judgment debtor has property, which he unjustly refuses to apply toward the satisfaction of the judgment, is entitled to an order, requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.²

Warrant of Arrest, when.—Upon proof entitling a judgment creditor to an order, either before or after return of execution as aforesaid; and also proof, by affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the State, or conceal himself, and that there is reason to believe that he has property, which he unjustly refuses to apply to the payment of the judgment; the judge may, instead of making an order, issue a warrant under his hand, reciting the facts, and requiring the sheriff of any county, where the judgment debtor may be found, to arrest him, and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge.³

So, too, where such facts are made to appear, the judge may issue such warrant, at any time after the making of an order requiring the judgment debtor to attend and be examined, and before the close of his examination; and, if necessary, may direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant, and his decision thereupon.⁴

Undertaking on Arrest.—Where a judgment debtor has been arrested and brought before a judge, by virtue of a warrant as aforesaid, and it appears, to the satisfaction of

¹ Code Civ. Pro., § 2435.

³ Code Civ. Pro., § 2437.

² Code Civ. Pro., § 2436.

⁴ Code Civ. Pro., § 2438.

the judge, from his examination, or other proof, that there is danger that he will leave the State, or conceal himself, and that he has property, which he has unjustly refused to apply to the satisfaction of the judgment, the judge may make an order, requiring him to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect that he will, from time to time, as the judge directs, attend before the judge, or before a referee, appointed, or to be appointed, in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property which is not expressly exempted by law from levy and sale by virtue of an execution, or which is not his earnings for personal services rendered within sixty days next before the commencement of the proceedings against him, necessary for the use of a family, wholly or partly supported by his labor.¹

Injunction Order.—The judge by whom the order or warrant was granted, or to whom it is returnable, may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt, concerning which any person is required to attend and be examined, until further direction in the premises. Such an injunction order may be made simultaneously with the order or warrant, by which the special proceeding is instituted, and upon the same papers; or, afterwards, upon an affidavit showing sufficient grounds therefor.²

Service of Orders.—The orders requiring a person to attend and be examined, and the injunction order, must each be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.
2. A copy thereof, and of the affidavit, upon which it was made, must be delivered to him.

Service upon a corporation is sufficient, if made upon an officer, to whom a copy of a summons must be delivered,

¹Code Civ. Pro., §§ 2440, 2463.

²Code Civ. Pro., § 2451.

where a summons is personally served upon the corporation, unless the officer is specially designated by the judge.¹

Service of Warrant.—The sheriff, when he arrests a judgment debtor by virtue of a warrant issued as aforesaid, must deliver to him a copy of the warrant, and of the affidavit upon which it was granted.²

Order to Examine Third Person.—Upon proof, by affidavit, or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued as prescribed in section 2458 before mentioned, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars, the judgment creditor is entitled to an order, requiring the person or corporation to attend and be examined concerning the debt, or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor, in such a manner as he deems just.³

Order Permitting Payment of Debt to Sheriff.—At any time after the commencement of a special proceeding, as herein mentioned, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof, by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such notice, given to such persons, as he deems just, or without notice, make an order, permitting the person or corporation, to pay to a sheriff, designated in the order, a sum, on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution.

A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable

¹ Code Civ. Pro., § 2452.

³ Code Civ. Pro., § 2441.

² Code Civ. Pro., § 2453.

consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.¹

Order Requiring Delivery of Money or Property to Sheriff.—Where it appears, from the examination or testimony taken in a special proceeding as herein authorized, that the judgment debtor has, in his possession, or under his control, money or other personal property, belonging to him ; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person ; the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver.²

Sheriff's Duty where Money Paid or Property Delivered.—If the sheriff, to whom money is paid, or other property is delivered, pursuant to an order made as in the two foregoing subdivisions mentioned, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property, as if the money had been collected, or the property had been levied upon by him, by virtue of such an execution ; except, that after a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver ; or, if the case so requires, to deliver to the receiver the property in his hands. If, however, it appears, to the satisfaction of the judge, that an order, appointing a receiver, or extending a receivership, is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of prop-

¹ Code Civ. Pro., § 2446.

² Code Civ. Pro., § 2447.

erty so delivered, upon an execution in favor of the judgment creditor, issued either before or after the payment or delivery to the sheriff.¹

When Sheriff to Pay or Deliver to Judgment Debtor.—When money is paid, or property is delivered, as aforesaid, to a sheriff or receiver, and the special proceeding is thereafter discontinued or dismissed; or the judgment is satisfied without resorting to that money or property; or a balance of the money, or of the proceeds of the property, or a part of the property, remains in the sheriff's or the receiver's hands, after satisfying the judgment, and the costs and expenses of the special proceeding; the judge must make an order, directing the sheriff, or receiver, to pay the money, or deliver the property, so remaining in his hands, to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees, and all other sums legally chargeable against the same.²

Costs.—The judge may make an order, allowing to the judgment creditor a fixed sum as costs, consisting of his witness fees and other disbursements, and of a sum in addition thereto, not exceeding thirty dollars; and directing the payment thereof, out of any money which has come, or may come, to the hands of the receiver, or of the sheriff; or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.³ And where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined, and property, applicable to the payment of the judgment, has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a like sum as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.⁴

Punishment for Disobedience to Orders.—A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made in regard to the payment

¹ Code Civ. Pro., §§ 2448, 2449.

² Code Civ. Pro., § 2450.

³ Code Civ. Pro., § 2455.

⁴ Code Civ. Pro., §§ 2455, 2456.

of costs, or any order made in the proceedings here spoken of, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceeding; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him; may be punished by the judge, or by the court out of which the execution was issued, as for a contempt.¹

In what County to be Examined.—If the judgment debtor or other person, required to attend and be examined, as above detailed, or the officer of a corporation, required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office within the State, for the regular transaction of business in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.²

Proceedings Commenced Before one Judge, Continued Before Another.—Where these proceedings are instituted before a judge in the city and county of New York, or before a judge of the Supreme Court of Buffalo, or the city court of Brooklyn, they may be continued from time to time, before one or more other judges of the same court, with like effect as if instituted before the judge who last hears the same. And in case of the death, sickness, resignation, removal from office, absence from the county or other disability of an officer, before whom such a special proceeding has been instituted, other than the judges just named, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county, before an officer in an adjoining county, who would originally have had jurisdiction if it had been instituted there.

The judge before whom the proceeding is continued as aforesaid, is deemed to be the judge to whom an order or warrant is returnable.³

Corporations to which these Provisions do not apply.—

¹ Code Civ. Pro., § 2457.

³ Code Civ. Pro., § 2462.

² Code Civ. Pro., § 2459.

Where the judgment debtor is a corporation created by or under the laws of the State, or a foreign corporation created by or under the laws of another State, government or country, doing business within the State, or having a business agency, or a fiscal agency, or an agency for the transfer of its stock within the State, none of the foregoing provisions apply.¹

What Property cannot be Reached.—None of the foregoing provisions authorizes the seizure of or other interference with any property, which is expressly exempt by law from levy and sale, by virtue of an execution; or any money, thing in action or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding, where it is made to appear by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.²

9. *Surrogates Courts.*

These courts are now courts of record,³ and have jurisdiction specially conferred, in regard to proceedings in which a sheriff may be called upon to act; to enforce the payment of debts and legacies; the distribution of the estates of decedents; the payment or delivery, by executors, administrators and testamentary trustees, of money or other property in their possession, belonging to the estate;⁴ to compel the payment and delivery by guardians for infants of money or other property belonging to their wards;⁵ to issue citation to parties, in any matter within the jurisdiction of the court; and, in a case prescribed by law, to compel the attendance of a party;⁶ to issue, under the seal of the court, a subpœna, requiring the attendance of a witness, residing or being in any part of the State, or a subpœna duces tecum;⁷ and to punish any person for a contempt of

¹ Code Civ. Pro., § 2463.

² Code Civ. Pro., § 2463.

³ Code Civ. Pro., § 2, subd. 20.

⁴ Code Civ. Pro., § 2472, subd. 4.

⁵ Code Civ. Pro., § 2472, subd. 7.

⁶ Code Civ. Pro., § 2481, subd. 1.

⁷ Code Civ. Pro., § 2481, subd. 3.

court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in a like manner.¹

When Vacancy or Disability, who to act.—Where, in any county, except New York or Kings, the office of surrogate is vacant, or the surrogate is disabled, by reason of sickness, absence or lunacy; and special provision is not made by law, for the discharge of the duties of his office in that contingency; the duties of his office must be discharged, until the vacancy is filled, or the disability ceases as follows:

1. By the special surrogate.
2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.
4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act, as thus prescribed, proof of his authority to act must be made by an order of the general term of the Supreme Court, held within the department embracing the county.*

Where the surrogate of any county, except New York or Kings, is precluded or disqualified from acting with respect to any particular matter, his jurisdiction and powers with respect to that matter vest in the several officers before designated, in the order there provided; and the fact of the surrogate's being so disqualified or precluded, may be proved by his certificate thereof, or by affidavit or oral testimony. If there is no such officer before designated qualified to act with respect to said matter, the surrogate may file in his office a certificate stating that fact; specifying the reason why he is disqualified or precluded, and designating the surrogate of an adjoining county, other than New York or Kings, to act in his place in the particular matter. Thereupon the surrogate so designated has, with respect to that matter, all the jurisdiction and powers of

¹ Code Civ. Pro., § 2481, subd. 7.

² Code Civ. Pro., §§ 2484, 2487.

the surrogate making the designation, and may exercise the same in either county.¹

In any county, except New York or Kings, if the surrogate is disabled, by reason of sickness, absence, or lunacy, or the office of surrogate becomes vacant before the expiration of a full term, and there is no special surrogate, or special county judge of the same county, who is competent and able to act as surrogate, the board of supervisors may, in its discretion, appoint a suitable person, to act as surrogate, until the surrogate's disability ceases, or his term of office expires, if the disability continues until then; or until a special surrogate, or a special county judge, is elected or appointed.²

When Vacancy or Disability in New York or Kings county.—In the county of New York, the court of common pleas for that city and county, at a special term thereof, and in the county of Kings, the Supreme Court, at a special term thereof, held in the city of Brooklyn, must, upon presentation of proof of its authority, exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded, or disqualified, from acting, with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled, by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled, or the disability ceases, as the case may be. The proof required for these courts to so act, in case where the surrogate is precluded or disqualified from acting in a particular matter, is the surrogate's certificate, thereof, or affidavit, or oral testimony; in the other cases mentioned, an order of the general term of the Supreme Court, held within the department embracing the county.³ Where proceedings are taken in these courts, as aforesaid, the seal of the court, in which it is taken, must be used, where a seal is necessary. The proceeding must be entitled in that court, and the papers therein must be filed,

¹ Code Civ. Pro., §§ 2485, 2487.

³ Code Civ. Pro., §§ 2486, 2487.

² Code Civ. Pro., § 2492.

or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made, by a judge of the court.¹

In New York county the board of aldermen may fill a vacancy.²

Surrogate's clerk.—A surrogate may, by a written order, filed and recorded in his office, and which he may, in like manner, revoke at pleasure, appoint a clerk employed in his office to be the clerk of the surrogate's court, and the clerk so appointed, may, among other things, issue any mandate to which a party is entitled as of course, either unconditionally, or upon the filing of any paper; and may sign, as clerk of the court, and affix the seal of the court to, any letters or mandate, issued from the court.³

Citation, Service of.—A citation is the process by which most proceedings in surrogate's courts are commenced. It may be served in any county.⁴ In all cases, except where otherwise specially prescribed, service of a citation is made upon an adult person, or an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served, or by leaving a copy at his residence, or the place where he sojourns, with a person of suitable age and discretion, under such circumstances, that the surrogate has good reason to believe that the copy came to his knowledge, in time for him to attend at the return day. Such service must be made, if within the county of the surrogate, or an adjoining county, at least eight days before the return day thereof; if in any other county, at least fifteen days before the return day; unless, in either case, the person served, being an adult, and not incompetent, assents in writing to a service within a shorter time. The service may be made by any person.⁵

Where it appears, by affidavit, to the satisfaction of the surrogate, from whose court a citation issued, that proper and diligent effort has been made to serve it upon a resident

¹ Code Civ. Pro., § 2490.

⁴ Code Civ. Pro., § 2515.

² N. Y. City Consol. Act 1882, § 1180.

⁵ Code Civ. Pro., § 2520.

³ Code Civ. Pro., § 2509.

of the State as just mentioned ; and that the person to be served cannot be found, or, if found, that he evades service so that it cannot be made ; the surrogate may make an order, directing that service thereof be made in the same manner prescribed for the service of a summons, issued out of any court of record, and the provisions of sections 436 and 437 of the Code of Civil Procedure, apply to the service of a citation made pursuant to such order.¹

Where the service is to be made upon an infant under fourteen years of age, a person judicially declared to be incompetent to manage his affairs, by reason of lunacy, idiocy or habitual drunkenness, or a corporation, it is made in the same manner prescribed for the personal service of a summons upon such a person, or upon a corporation.² Proof of service of citation is made in the same way, as proof of service of summons, issued out of the Supreme Court.³

Decree for Money ; Docketing and Enforcement of.—

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must, upon payment of his fees, furnish to any person applying therefor, one or more transcripts, duly attested, stating all the particulars, with respect to the decree, which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered, in the Supreme Court, so far as the provisions of law, directing such entries, are applicable to such a decree. Each county clerk, to whom such a transcript is presented, must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book, kept in his office, as prescribed by law for docketing a judgment of the Supreme Court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it was such a judgment.⁴

Such decree may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of

¹ Code Civ. Pro., § 2521, *ante*, p. 203.

² Code Civ. Pro., § 2526, *ante*, pp. 193, 198.

³ Code Civ. Pro., § 2532, *ante*, p. 212.

⁴ Code Civ. Pro., § 2553.

the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects, the provisions of the Code of Civil Procedure, relating to an execution against the property of a judgment debtor, issued upon a judgment of the Supreme Court, and the proceedings to collect it, which have been given in another place, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being for that purpose regarded as a judgment; except that proceedings supplementary to execution founded thereon, must be taken as if the decree was a judgment of the county court, or, in the city of New York, of the court of common pleas.¹

Enforcement by Punishment for Contempt.—In either of the following cases, a decree of a surrogate's court, directing the payment of money, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution, as before mentioned.

2. Where part of it cannot be so enforced by execution; in which case the part or parts, which cannot be so enforced, may be enforced by proceedings to punish for contempt as aforesaid.

3. Where an execution, issued as before mentioned, to the sheriff of the surrogate's county, has been returned by him wholly or partly unsatisfied.

4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree by such proceedings for contempt as aforesaid, either without issuing an execution, or after the return of an execution, as he thinks proper.²

Enforcement of Orders.—A direction of a surrogate's court, made or entered in writing, and not included in a decree, is styled an order; and may be enforced in like manner as a similar order, made by the Supreme Court, in an

¹ Code Civ. Pro., § 2554.

² Code Civ. Pro., § 2555.

action ; and the costs are the same as upon such an order, and may be collected in like manner.¹

Security to stay Proceedings on Appeal from Decree for Money or Property.—An appeal from a decree directing an executor, administrator, testamentary trustee, guardian or other person appointed by the surrogate's court, to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property ; or by an executor or administrator, from an order granting leave to issue an execution against him, does not stay the execution of the decree appealed from, unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that, if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him, upon the appeal, and will pay the sum so directed to be paid or collected, or as the case requires, will deposit or distribute the money, or deliver the property so directed to be deposited, distributed or delivered, or the part thereof as to which the decree or order is affirmed.²

Security for Costs and Damages on Appeal.—To render a notice of appeal effectual for any purpose, except in the case just specified, or where it is specially prescribed by law, that security is not necessary to effect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding \$250.³

Security to Stay Proceedings on Appeal in Case of Commitment.—An appeal from a decree, or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty ; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required by law ; does not stay the execution of the decree or order appealed from, unless the appellant, gives an undertaking,

¹ Code Civ. Pro., § 2556.

³ Code Civ. Pro., § 2577.*

² Code Civ. Pro., § 2578.

with at least two sureties, in a sum therein specified, to the effect that, if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself, in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.¹

Requisites of Undertaking on Appeal.—Where the appeal is from a decree directing the payment, depositing, or distribution of money, the sum specified in the undertaking must be not less than twice the sum directed to be paid, deposited, or collected. Where the appeal is from an order granting leave to issue an execution, it must be not less than twice the sum, to collect which the execution may issue. In every other case the amount of the undertaking must be fixed by the surrogate, or by the judge of the appellate court.² Such undertaking must be to the people of the State; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate, or a judge of the appellate court; and must be filed in the surrogate's office.³

Proceedings to Discover Property Withheld from Executor.—An executor or administrator may present to the surrogate's court, from which letters were issued to him, a written petition, duly verified, setting forth, upon knowledge, or information and belief, any facts, tending to show that money, or other personal property, which ought to be delivered to the petitioner, or which ought to be included in an inventory, or appraisal, is in the possession, or under the control of a person, who withholds the same from him; or conceals, or refuses to exhibit it, so that it cannot be inventoried, or appraised; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry, and to be examined accordingly. The petition may be accompanied with an affidavit, or evidence, written or oral, tending to support the allegations thereof. If the surrogate is satisfied, upon the papers so presented, that there are reasonable grounds for the inquiry, he must issue

¹ Code Civ. Pro., § 2579.

³ Code Civ. Pro., § 2581.

² Code Civ. Pro., § 2580.

a citation accordingly; which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing.¹

Where the person, or any of the persons, to be cited, does not reside, or is not within the county of the surrogate, the citation may, in the surrogate's discretion, require him to appear at a specified time, at a place within the county where he resides, or is served, before a judge, a justice of the peace, or a referee, designated in the citation, or before the surrogate of that county.²

The surrogate must annex to or indorse upon the citation, an order, requiring the party cited to attend, personally, at the time and place therein specified. The citation and order must be personally served; and service thereof is ineffectual, unless it is accompanied with payment, or tender of the sum, required by law to be paid, or tendered, to a witness, who is subpœnaed to attend a trial in the Supreme Court. A failure to attend, as required by a citation and order personally served, may be punished as a contempt of the court.³

If the surrogate is absent, the petition may be presented to the county judge, the special county judge, or the special surrogate, or to a justice of the Supreme Court, or a judge of a superior city court within his city, or, except in New York or Kings county, to the mayor or recorder of a city within the surrogate's county. The officer to whom it is presented, has the same power as the surrogate, with respect to all the proceedings, and must issue a citation, and an order, returnable before him, or, as before mentioned, before a judge, justice of the peace, or surrogate in the county where the person cited resides, or is served. He may, at any stage of the proceedings, make an order transferring them to the surrogate, who must thereupon complete them, in like manner, as if he had issued the citation.⁴

Examination; Claims of Ownership, etc., by Person Cited.—A refusal to be sworn, or to answer any question which the officer conducting the examination determines to be proper, is punishable by the officer or referee conducting

¹ Code Civ. Pro., § 2706.

² Code Civ. Pro., § 2707.

³ Code Civ. Pro., § 2708.

⁴ Code Civ. Pro., § 2709.

the examination in the manner as a like refusal by a witness subpoenaed to attend a hearing before the surrogate.

In case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the surrogate shall dismiss the proceeding as to such property so claimed.¹

Decree Awarding Possession; Security to Prevent.—Where it appears to the surrogate or other officer, who issued the citation, from the examinations and other testimony, if any, that there is reason to suspect, that money, or other property of the decedent, is withheld or concealed by the person cited, he must, unless that person gives security, as hereinafter mentioned, make a decree, reciting the ground of making it, and requiring the person cited to deliver possession of the money or other property to the petitioner. The decree must specify the sum of money, or describe the other property. Where it is made by an officer, other than the surrogate or temporary surrogate, it must be entered, and may be enforced, as a decree of the surrogate's court.²

The person cited may execute a bond to the petitioner, with such sureties, and in such a penalty as the surrogate approves; describing the property or specifying the sum of money; and conditioned that the principal in the bond will pay to the obligee, or his successor, the money; or that he will deliver to him the property, or, in default thereof, pay to the obligee the full value of the property, and, in either case, that he will pay all damages awarded against him for withholding the property, whenever it is determined, in an action or special proceeding to be brought by the obligee or his successor, that it belongs to the estate of the decedent. Upon the presentation of such a bond, and the payment of the costs, if any, which the surrogate or other officer awards to the petitioner, within such time as is fixed for that purpose, an order must be made dismissing the proceedings.³

Disobedience to Decree, when Contempt—Warrant to Seize Property.—Where the decree requires the person cited

¹ Code Civ. Pro., § 2710.

³ Code Civ. Pro., § 2713.

² Code Civ. Pro., § 2712.

to deliver money, disobedience thereto may be punished as a contempt of the court. Where it requires him to deliver possession of other property, a warrant must be issued, upon the application of the petitioner, directed to the sheriff, or, generally, to any constable of the county, or any marshal of the city, where the property may be found, commanding him to search for it; to seize it, if it is found in the possession of the person cited, or his agent, or a person deriving title from him since the presentation of the petition, and for that purpose, if necessary, to break open any house in the day time, to deliver the property so seized to the petitioner, and to return the warrant within sixty days thereafter. If the decree was made by the surrogate or temporary surrogate, the warrant must be under the seal of the surrogate's court; if by any other officer, it must be under his hand, and returnable before him.

The issuing of such warrant does not affect the power of the court to enforce the decree, or any part thereof, by punishing a disobedience thereto.¹

Compelling Return of Inventory.—A creditor, or person interested in the estate, may present to the surrogate's court proof, by affidavit, that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. Thereupon, if the surrogate is satisfied that the executor or administrator is in default, he must make an order, requiring the delinquent to return the inventory, or a further inventory; or, in default thereof, to show cause at a time and place therein specified, why he should not be attached. Upon the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate must issue a warrant of attachment against him, upon which proceedings to punish him for contempt are instituted.²

A person committed to jail, upon the return of such warrant, may be discharged by the surrogate, or a justice of the Supreme Court, upon his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating to the estate under his control, to the

¹ Code Civ. Pro., § 2714.

² Code Civ. Pro., § 2715.

surrogate, or to a person authorized by the surrogate to receive the same.¹

Subpœna.—As we have before seen, subpœnas in surrogate's courts are issued out of the court under seal.² They are served in the same manner as in other courts of record; the witness fees are the same as in the Supreme Court,³ and proof of service is made in the same manner as of a summons issued out of the Supreme Court.⁴ Such subpœna may also require the production of books and papers.

The attendance of witnesses may be compelled in the same manner as in other courts of record, as well as their disobedience punished as a contempt.

Proof of Service of other Papers.—In every other case than the service of a citation or a subpœna, proof of service must be made by affidavit; or where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by affidavit or otherwise, of the genuineness of his signature.⁵

10. *Fires; Investigating Origin of.*

Whenever it shall be made to appear by the affidavit of a credible witness, that there is ground to believe that any building has been maliciously set on fire, or attempted to be, except in the cities of New York, Brooklyn and Buffalo, any coroner, sheriff or deputy sheriff of the county in which such crime is supposed to have been committed, to whom such affidavit shall be delivered, and who shall be requested, in writing, by the president, secretary, or agent of any insurance company, or by two or more reputable freeholders, to investigate the truth of such belief, shall do so without delay.

Summoning Jury, etc.—For the purpose of holding such inquest, the statute confers on such officer all the powers given to coroners for the purpose of holding inquests by the first four sections of article first of title seventh of chapter second of part fourth of the Revised Statutes; and, although these sections are now superseded, together with

¹ Code Civ. Pro., § 2716.

⁴ Code Civ. Pro., § 2532.

² Code Civ. Pro., § 2481, subd. 3.

⁵ Code Civ. Pro., § 2532.

³ Code Civ. Pro., § 2566.

the entire article in regard to coroners inquests by sections 785-788 of the Code of Criminal Procedure, they are still the only provision for summoning jurors and witness in inquests here spoken of.

By the sections just referred to, the officer shall summon, forthwith, not less than nine nor more than fifteen persons, qualified by law to serve as jurors, and not exempt from such service, to appear before such officer forthwith, at such place as he shall appoint, and whenever six or more of the jurors shall appear, they shall be sworn by such officer. The officer holding such inquest has power to issue subpœnaes for witnesses, returnable either forthwith, or at such time and place as he shall appoint therein, and every person served with any such subpœna shall be liable to the same penalties for disobedience thereto, and his attendance may be enforced in like manner as upon subpœnas issued in justice's court.

Inspection, etc., by Jury; Inquisition.—The jury must first inspect the place where the fire was, or was attempted, and shall then proceed to hear the testimony; after which they shall deliver to the officer holding the inquest their inquisition, in writing, signed by them, in which they shall find and certify how, and in what manner, such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner, in case they find a malicious setting on fire, or an attempt so to do. But if such jury shall be unable to ascertain the origin and circumstances of such fire, they shall find and certify accordingly.

Witnesses to be Bound Over; Person Charged may be Arrested.—If the jury find that any building has been designedly set on fire, or has been attempted so to be, the officer holding such inquest shall bind over the witnesses to appear and testify at the next criminal court, at which an indictment for such offense can be found, that shall be held in the county; and if the party charged with such offense be not in custody, shall have power to issue process for his arrest, in the same manner as justices of the peace.

Examination of Accused.—Where such process is issued, the officer issuing it has the same power to examine the

party arrested as a justice of the peace, and shall proceed, in all respects, in like manner.

Testimony on, and Return of Inquest.—The testimony of all the witnesses examined before the jury must be reduced to writing by the officer holding the inquest, and must be returned by him, together with the inquisition of the jury, and all recognizances and examinations taken to the next criminal court of record that shall be held in such county.

Fees, etc.—The compensation of the officers holding such inquest, and their actual and necessary expenses shall be fixed, audited and paid in the same manner as provided by law for coroners.¹

11. *Wrecks.*

Powers and Duties of Sheriffs and Coroners.—Sheriffs and coroners concurrently, with wreck-masters, in every county in which any wrecked property shall be found, when no owner or other person, entitled to the possession, shall appear, severally have power, and it is their duty, to pursue all necessary measures for saving and securing such property; to take possession thereof, in whose hands soever the same may be, in the name of the people of this State; to cause the value thereof to be appraised by indifferent persons; and to keep the same in some safe place, to answer the claims of such persons as may thereafter appear entitled thereto.²

What is Wrecked Property.—Any ship, vessel or boat, and any goods, wares and merchandise that shall be cast by the sea or any inland lake or river upon the land, is what is here spoken of as wrecked property.³

The property must have been cast upon the land. For example, a canal boat, sunk in a navigable river, is not wrecked property within the statute.⁴

Notice Required.—Every such officer, into whose possession any wrecked property shall come, shall immediately

¹ 2 R. S. (5th ed.), § 989; id. (6th ed.), § 1014; 3 id. (7th ed.), § 2144; id. (5th ed.), § 1036; id. (6th ed.), § 1039.

² 2 R. S. (5th ed.), § 961; id. (6th ed.), § 979; 3 id. (7th ed.), § 2080.

³ 2 R. S. (5th ed.), § 960; id. (6th ed.), § 979; 3 id. (7th ed.), § 2030.

⁴ *Baker v. Hoag*, 7 N. Y., 555.

thereafter publish a notice, directed to all parties interested, for at least four weeks in succession, in one or more of the newspapers printed in the city of New York; such notice shall contain a minute description of such wrecked property, and of every bale, bag, box, cask, piece or parcel thereof, and of the marks, brands, letters, and figures on each, and shall state where such wrecked property then is, and its actual condition, and the name, if known, of the vessel from which it was taken, or cast on shore, and of the master and super-cargo of such vessel, and the place where such vessel then is, and its actual condition. The expense of publishing such notice, as well as all notices in these proceedings, is a charge on the property.

When Property Perishable, Sale and Disposition of Proceeds.—If the property is in a perishable state, so as to render a sale thereof expedient, such officer shall apply to the county judge of the county, by a petition supported by an affidavit of the facts, for an order authorizing such sale; and if the judge shall be satisfied that a sale would be most beneficial to the parties interested, he must make the order applied for. If such order is made, the officer having custody of the property shall sell the same at public auction, at the time and in the manner specified in the order. Public notice of such sale, as well as of any sale in these proceedings, shall be published by such officer, for at least two weeks in succession in one or more of the newspapers printed in the city of New York, which notice shall state the time and place of the sale, and shall contain a particular description of the property to be sold. The proceeds of such sale, after deducting the expenses thereof, as the same shall be settled and allowed by the judge making the order, shall be paid to the treasurer of the county where the property was found.

Where Claimed Within One Year.—If within one year after such wrecked property shall have been found and saved, any person shall claim the same, or the proceeds thereof, as owner or consignee, or as agent of the owner or consignee, and shall establish his claim by evidence, which the county judge shall deem to be satisfactory, it shall be the duty of such judge to make an order directing the

officer, in whose possession the property or the proceeds thereof shall be, to deliver or pay the same to the claimant, upon the payment by him of a reasonable salvage, and all necessary expenses incurred in the preservation and keeping of such property. No such order shall, however, be made, unless the claimant shall deliver to such judge a bond, with one or more sufficient sureties to be approved by the judge, conditioned for the payment of all damages that may be recovered against such claimant, or his representatives, within two years after the date of such bond, by any person establishing his title as owner of the property, or proceeds, to be delivered. The bond shall be taken in the name of the people of this State, and the penalty shall be double the value of the property, or proceeds, before mentioned, and shall be filed in the clerk's office of the county where taken.

Suit by Owner.—The rejection by the judge, to whom it may be exhibited, of any claim for wrecked property, shall not preclude the claimant from maintaining a suit for the recovery of such property, or its proceeds, against the officer in whose hands the same shall be; but if the plaintiff in such suit shall prevail, there shall be deducted, in addition to the salvage and expenses charged on the property, from the damages to be recovered, all the costs of the defendant in making his defense.

Claim for Salvage.—It shall be the duty of every officer to whom any order, duly made, for the delivery of wrecked property, or the payment of its proceeds, shall be directed, to present to the claimant exhibiting such order, a written statement of the claims for salvage and expenses on such property and proceeds. If the claimant shall refuse to allow such claims, the amount of such salvage and expenses shall be adjusted in the manner hereinafter provided.

All sheriffs, coroners, and wreck-masters, and all persons employed by them, and all other persons aiding and assisting in the recovery and preservation of wrecked property, shall be entitled to a reasonable allowance as salvage, for their services, and to all expenses incurred by them, in the performance of such services, out of the property saved,

and the officer having the custody of such property shall detain the same, until such salvage and expenses shall be paid. The whole salvage that shall be claimed in any case shall not exceed one-half of the value of the property or proceeds on which such salvage shall be charged, and every agreement, order or adjustment allowing a greater salvage shall be void.

If, in any case, the amount of salvage and expenses on property saved, shall not be settled, by the agreement of the parties, the owner or consignee of such property, or the master or super-cargo having charge thereof at the time the same was wrecked, or a claimant having an order for its delivery, may apply to the judge of the county court of the county in which such property shall be, for the appointment of suitable persons as appraisers, to adjust and settle the amount of such salvage and expenses. It shall be the duty of the judge to whom such application shall be made, by an order under his hand and seal to appoint three disinterested freeholders of the county, not inhabitants of the town in which the property shall have been saved, to adjust and settle such salvage and expenses.

The persons so appointed, before they shall enter on the performance of their duties, shall be sworn to perform faithfully and impartially the duties of their trust, before any officer authorized to administer oaths. They shall have power to issue compulsory process for the attendance of witnesses, and to administer oaths to all witnesses who shall attend or be produced; and their decision, or that of two of them, under their hands, as to the amount of salvage and expenses that ought to be paid, and the sums to be paid to each person entitled to share in such salvage, or claiming such expenses, shall be final and conclusive.

The fees and expenses of the appraisers shall be paid by the person upon whose application they shall have been appointed, and shall be a charge on the property saved. Each appraiser shall be entitled to two dollars for each day's necessary attendance, and to a sum not exceeding one dollar for his daily expenses.

Officer's Duty on Order.—The officer to whom any order duly made, for the delivery of wrecked property, or pay-

ment of its proceeds, shall be directed, after payment or tender of payment of salvage and expenses, as agreed to, or adjusted, as aforesaid, shall deliver such property, or pay over the proceeds thereof, according to the terms of such order.

Sale when not Claimed within one Year, or Salvage and Expenses not Paid, etc.—If within a year after wrecked property shall have been saved, no person shall have appeared to claim the same, or if within three months after a claim shall have been preferred, the salvage and expenses on such property shall not have been paid, or a suit for the recovery of the property have been commenced, it shall be the duty of the officer in whose custody such property shall be, to sell the same at public auction, and to pay the proceeds of such sale, deducting salvage and expenses, into the treasury of this State, for the benefit of the parties interested ; but in no case shall any deduction of salvage and expenses be made, unless the amount thereof shall have been settled upon due proof, by an order of the county judge of the county in which the property shall have been saved, a copy of which order and of the evidence in support thereof, shall be transmitted by the judge making it to the comptroller. The provisions just recited apply also to the proceeds of wrecked property, so far as relates to the time and manner of settling the salvage and expenses chargeable thereon, and the balance of such proceeds, after the salvage and expenses as settled shall have been deducted, shall be paid by the county treasurer into the treasury of the State. The notice required of such sale has already been specified in speaking of the sale of perishable property.

Penalties.—Every sheriff, coroner, wreck-master or other officer, who shall detain in his hands any wrecked property or the proceeds thereof, after the salvage and expenses chargeable thereon shall have been agreed to or adjusted, and the amount thereof shall have been paid, or offered to be paid to him, or who shall be guilty of any fraud, embezzlement or extortion in the discharge of his duties, or who shall, in any manner, violate any of the provisions of the statute hereinbefore given, shall forfeit treble damages to the party injured, and shall be deemed guilty of a misdemeanor.

And every person who shall take away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, or who shall knowingly have in his possession any goods so taken or found, and shall not deliver the same to the sheriff, or one of the coroners or wreck-masters of the county where the same shall have been found, within forty-eight hours after the same shall have been taken by him, or have come into his possession, shall forfeit treble the value of the goods so taken or kept by him, to the owner or consignee thereof, and shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried. And such offense is also made a misdemeanor by section 538 of the Penal Code.

Every person who shall deface or obliterate the marks on wrecked property, or in any manner disguise the appearance thereof, with intent to prevent the coroner from discovering its identity; and every person who shall destroy or suppress any invoice, bill of lading, or other document, tending to show the ownership of wrecked property, shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment, the fine not to exceed \$2,000, the imprisonment three years.

Duty of Sheriffs, Coroners and Constables as to Offenses Against Statute—It shall be the duty of all judges, sheriffs, justices of the peace, coroners, constables and wreck-masters, to present all offenses and offenders against the provisions hereinbefore given, that shall come to their knowledge, within their respective counties, to the grand jury, at the next court of general sessions therein.¹

12. *Criminal Contempts.*

What are, Under Code of Civil Procedure.—The Code of Civil Procedure gives to courts of record power to punish for a criminal contempt, a person guilty of either of the following acts, and no others:

1. Disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and pres-

¹ 2 R. (5th ed.), §§ 961-964; id. (6th ed.), §§ 979-982; 3 id. (7th ed.), §§ 2080-2083.

ence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Willful disobedience to its lawful mandate.

4. Resistance willfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness: or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision or other proceeding therein.¹

There are many other provisions declaring certain acts or omissions to be a contempt of court, which fall under subdivision five, viz.: "A willful disobedience to its lawful mandate," and which it is not necessary to here enumerate.

All contempts spoken of in the Code of Civil Procedure come under the above, or under the provisions already spoken of as to contempts other than criminal, and some may be under both or either.

How Punished.—Where such a contempt is committed in the immediate view and presence of the court, it may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.²

Punishment may be by fine, not exceeding \$250, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.³

Commitment.—The commitment must set forth the particular circumstances of the offence for which the person committed has been adjudged in contempt.⁴

Not a Bar to Indictment.—Such punishment for con-

¹ Code Civ. Pro., § 8.

³ Code Civ. Pro., § 9.

² Code Civ. Pro., § 10.

⁴ Code Civ. Pro., § 11.

tempt is not a bar to an indictment therefor, but where convicted on such indictment the court, in sentencing, must take into consideration the previous punishment.¹

Must be Actually Confined ; Habeas Corpus.—A person committed, as aforesaid, must be actually confined and detained within the jail, and is not entitled to the jail liberties.² And where, on the return to a *habeas corpus*, it appears that he is detained for a criminal contempt, as aforesaid, specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged, the court or judge must forthwith remand him.³

Under the Code of Criminal Procedure.—Disobedience to a subpoena, or a refusal to be sworn, or to testify, in criminal actions, or proceedings, or proceedings of a criminal nature, or in the examination of witnesses therein, conditionally, may be punished as a criminal contempt in the same manner as above provided by the Code of Civil Procedure.⁴

As a Misdemeanor.—Under the Penal Code it is provided that a criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court ;⁵ but that the court passing sentence may mitigate the punishment, if the defendant has already been punished by fine or imprisonment for contempt.⁶

And it is also by said Code provided, that a person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor :

1. Disorderly, contemptuous or insolent behavior, committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Behavior of the like character, committed in the presence of a referee or referees, while actually engaged in a trial or hearing, pursuant to the order of the court, or in the presence of a jury, while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.

¹ Code Civ. Pro. , § 13.

² Code Civ. Pro., § 157.

³ Code Civ. Pro., § 2032.

⁴ Crim. Code, §§ 619, 635, 729, 952.

⁵ Penal Code, § 680.

⁶ Penal Code, § 681.

3. Breach of the peace, noise or other disturbance, directly tending to interrupt the proceedings of a court, jury or referee.

4. Willful disobedience to the lawful process or other mandate of a court.

5. Resistance willfully offered to its lawful process or other mandate.

6. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

7. Publication of a false or grossly inaccurate report of its proceedings. But no person can be punished as provided in this section, for publishing a true, full and fair report of a trial, argument, decision or other proceeding had in court.¹

These contempts are treated and punished like other misdemeanors.

Justice's Courts.—Although the constable and not the sheriff is the executive officer of these courts, it is important for the sheriff to know the jurisdiction of justices in the matter of criminal contempts, as he, where he is also the keeper of the county jail, is the officer in whose custody the offender is placed on commitment.

A justice of the peace has power to punish, for a criminal contempt, a person guilty of either of the following acts:

1. Disorderly, contemptuous or insolvent behavior towards him, while engaged in the trial of an action, the rendering of a judgment or any other judicial proceeding; where such behavior directly tends to interrupt the proceedings, or to impair the respect due to his authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt his official proceedings.

3. Resistance, willfully offered, in his presence, to the execution of his lawful mandate.

He has not power to punish, for a criminal contempt, in any other case.²

Hearing.—A justice of the peace must issue a warrant for the offender, and cannot punish for contempt until an opportunity has been given for a defense.³

¹ Penal Code, § 143.

² Code Civ. Pro., § 2872.

³ Code Civ. Pro., § 2870.

Punishment.—The punishment for such contempt may be a fine not exceeding twenty-five dollars, or imprisonment in the county jail not exceeding five days, or both; and where a person is committed to prison for the non-payment of the fine, he must be discharged at the expiration of ten days; but where he is also committed for a definite time, the ten days must be computed from the expiration of the definite time.¹

Record of Conviction; Commitment.—Upon a conviction for such contempt, the justice must, within ten days after the conviction, make up, subscribe, and file in the county clerk's office, a record thereof, stating therein the particular circumstances of the offense, and the punishment awarded by him upon conviction.²

The warrant of commitment must set forth the particular circumstances of the offense; otherwise it is void,³ and no protection to the sheriff. The sheriff should, therefore, refuse to take the custody and to confine, where the commitment does not so set forth the offense, and where it appears from the commitment itself that the justice had no jurisdiction.

Payment of Fine.—An officer receiving or collecting a fine imposed by a justice for contempt, must, within ten days thereafter, pay the money for the benefit of the poor, to the overseer or superintendent of the poor, city, or district wherein the fine was imposed; or, where there is no such officer, to the officer or officers performing corresponding functions under another name; unless the board of supervisors has directed the payment of fines and penalties to the supervisor of the town, in a case where it is authorized by law so to do.⁴

13. *Demands Against Ships and Vessels.*

Warrant to Enforce Lien.—Any person having a lien by statute upon any ship, or vessel, including canal boat and steamboats,⁵ for debt, or for damage done by said ship, or vessel, may make application to any officer authorized by

¹ Code Civ. Pro., § 2871.

⁴ Code Civ. Pro., § 2875.

² Code Civ. Pro., § 2873.

⁵ King v. Greenway, 71 N. Y., 413.

³ Code Civ. Pro., § 2874.

law to perform the duties of a justice of the Supreme Court at chambers in the county within which such ship, or vessel, shall then be, for a warrant to enforce the said lien, and to collect the amount thereof.

The proceedings apply only to domestic ships, or vessels, for supplies, repairs, etc., furnished them in home ports, or damages done by such ships, or vessels, and not to foreign vessels, or vessels engaged in foreign commerce.¹

The officer to whom application is made, in the manner provided by the statute, if it is a case coming within the provisions of the statute, issues a warrant to the sheriff, specifying the amount of the claim, and the names of the persons making such claim, and commanding him to attack, seize and safely keep said ship, or vessel, her tackle, apparel and furniture, to satisfy such claim, if established, to be a lien upon such vessel, according to law, and to make return of his proceedings under such warrant, to the officer who issued the same within ten days after such seizure.

Undertaking.—Such warrant shall not be issued unless the person applying therefor shall deliver to the officer to whom the application is made to be filed by him, an undertaking to the effect that if the said applicant do not, within three months after the delivery thereof, prosecute any bond which may be given upon the discharge of such warrant, or if said applicant in any action brought upon such bond be finally adjudged not to have been entitled to such warrant, the parties giving such undertaking will pay all costs that may be awarded against such applicant, not exceeding the sum specified in the undertaking, which shall be at least \$100, and any damages that may be sustained, by reason of the seizure of such vessel, under such warrant, not exceeding the sum of fifty dollars. Such undertaking shall be executed by the applicants, or one of them, or their agent, and at least one surety, who shall be a resident and householder within this State, and shall be approved by the said officer.

Execution and Return of Warrant.—Any sheriff to whom such warrant shall have been directed and delivered,

¹ In the matter of the Steamship Circassian, 50 Barb., 490; Poole v. Kermit, 59 N. Y., 554.

shall forthwith execute the same, by seizing, and keeping in his custody, said vessel, her tackle, apparel and furniture, to be disposed of under the statute ; and shall, within ten days after such seizure, make his return of his proceedings, under the warrant, to the officer who issued it, which return must state whether he has seized said vessel by virtue of any other warrant, or warrants, and if so, specify in whose behalf, and for what sums, such other warrants have been issued, respectively, and the time of his reception thereof.

Such return, as well as the payment of any moneys in his hands, and the taking of any steps necessary for the safety of such vessel ordered to be taken, may be compelled by any officer having jurisdiction of the proceedings, by order and by process of attachment for disobedience thereof, on the application of any person interested therein.

Notice of Issuance of Warrant.—The person applying for such warrant shall, within three days after the issuing thereof, cause a notice to be published once in each week, for four successive weeks, in some newspaper published in the county in which such vessel may then be, or if no newspaper be so published in such county, then in the nearest county in which a newspaper shall be so published, setting forth that such warrant has been issued, the amount of the claim specified therein, the day when such warrant was issued, and that such vessel will be sold for the payment of the claims against her, unless the master, owner, or consignee thereof, or some person interested therein, appear and discharge such warrant according to law, within thirty days from the first publication of such notice ; and in case the vessel is built, used, or fitted for the navigation of any of the canals or lakes of this State, shall also serve a copy of such notice, personally, at least ten days before the issuing of the order of sale, as provided by statute, upon all persons who may have filed any claim, or lien, upon such ship, or vessel, by mortgage or otherwise, in the office of the auditor of the canal department, or the service of such notice may be made, at least twenty days before the issuing of said order, by leaving a copy of the same at the dwelling-house in charge of some person of suitable age, or by de-

positing the same in the post-office, properly folded and directed to such persons at their respective places of residence, and paying the postage thereon.

Discharge of Warrant.—Upon application to the officer issuing the warrant, and execution of a proper bond, and delivery thereof to the attaching creditor, and payment of the taxed fees of the sheriff, an order will be made by such officer discharging the attachment; whereupon no further proceedings can be had against the vessel, founded upon any demand secured by such bond.

Sale.—If the creditor who shall have exhibited his claim, shall not have been satisfied, and if such vessel shall not have been discharged within thirty days after the first publication of the notice of the issuance of the warrant of attachment, upon due proof of the publication of such notice, the officer who issued such warrant shall issue his order to the sheriff holding the vessel under such warrant, directing such sheriff to proceed and sell the vessel so seized by him, her tackle, apparel and furniture, and such order shall state the amount deemed necessary to be raised, to satisfy all unsatisfied liens which have been exhibited against such vessel.

Upon proof of personal service of the notice that a warrant has issued as hereinbefore specified, and of notice of the application for sale upon the owners of the vessel, and upon all other unpaid creditors, who have filed specifications of their liens, pursuant to the provisions of the statute, such order of sale may, in the discretion of the officer, be issued at any time after the seizure of such vessel.

Within ten days after the service of such order, the sheriff shall, unless such order be sooner vacated, proceed to sell the vessel so seized by him, her tackle, apparel and furniture, upon the same notice, in the same manner, and in all respects subject to the provisions of law, in case of the sale of personal property upon execution; and shall return to the officer making the order of sale, his proceedings thereunder.

Proceeds of Sale, Disposition of.—The sheriff shall retain the proceeds of the sale for distribution, after deducting therefrom his fees and expenses in seizing, persevering, watching and selling such vessel, when duly taxed.

At the time of issuing the order for a sale, the officer granting the same shall order a notice to be published in the same newspaper in which the notice of seizure as aforesaid is required to be published, once a week for three weeks, requiring all persons who have any liens upon such vessel, and the master, owner, agent or consignee, and all other persons interested in such vessel, to appear before him at a day to be therein specified, not less than thirty days and not more than forty days from the first publication of such notice, to attend a distribution of the proceeds arising from the sale. The officer may direct such distribution to be made before a referee. The proceeds, until distributed, stand in the place of the vessel, and liens entitled to be enforced against the vessel may be enforced against such proceeds. The liens are entitled to be paid, with their respective costs, expenses and allowances, in the order in which the respective warrants were delivered to the sheriff, and the costs, disbursements, and allowances upon the distribution are the same as those allowed in a civil action. Provision is made by the statute for contesting claims made, and for appeals upon the decision of contested claims. Upon a determination of all claims, the proceeds are distributed by the court, and such proceeds are subject to the direction of the court, and may, at any time, be invested by such court, according to the practice thereof. After payment of all claims established, if there is a surplus, the same is distributed by the court to the persons entitled thereto; but before distribution thereof, a notice must be published, in the same manner and for the same time as the notice of seizure, specifying the amount of such surplus, the amount of the proceeds of sale, the names of the persons applying therefor, together with the name of the vessel sold and the date of the sale.

Absence or Inability of Judge.—Whenever these proceedings shall have been commenced before any judge, the same and every part thereof may, in the absence or inability of such judge, or by his order to that effect, be continued before any other judge of the same court.

Fees of Sheriff.—The fees of a sheriff in these proceedings, are as follows: For serving a warrant, one dollar;

for returning the same, one dollar; for the expenses of keeping such vessel in custody, the necessary sums paid by him therefor, not exceeding, however, the sum of two dollars and fifty cents for each day the vessel shall have been held by him in custody. Such sheriff shall not be entitled to receive any other or greater sums than those above specified, for any service rendered by him in any proceeding under the statute, nor shall he be allowed expenses of custody upon more than one warrant at the same time. All costs, disbursements and fees shall be verified by affidavit and adjusted by the officer who issued the warrant. Upon a sale, however, he is entitled to the same fees as upon a sale of personal property upon execution.¹

14. *Distraining Inanimate Property Doing Damage.*

Where Property is Doing Damage.—When any person is authorized by law to distrain any inanimate goods or chattels doing damage, he shall keep the same in some safe and convenient place until the damage shall be appraised and the goods be sold or otherwise disposed of; and shall apply to two fence-viewers of the town to appraise the damages sustained by him. The said fence-viewers shall thereupon immediately repair to the place, and view the damage done; and they may take the evidence of any competent witnesses of the facts and circumstances necessary to enable them to ascertain the extent of such damage, for which purpose either of them may administer an oath to such witnesses. The said fence-viewers shall ascertain and certify, under their hands, the amount of such damage, with their fees for their services, and shall also estimate and certify the value of the property distrained.

The distrainer shall thereupon affix a notice in three public places of the town, for ten days, as follows:

1. Specifying therein the property distrained, and the amount of damages certified.

2. Requiring the owner of such property to redeem and remove the same, before the day therein appointed for the sale thereof.

3. Stating that such property will, on some day, at least ten days from the day of the first posting thereof, be sold

¹ 3 R. S. (5th ed.), 795-802; id. (6th ed.), 783-789; id. (7th ed.), 2404-2410.

to pay such damages, and the costs and charges of the proceeding.

If the value of the property, as certified, exceed fifty dollars, the distrainer shall publish a notice in the nearest newspaper, once in each week, for four weeks, similar to that required to be posted, except that the time of sale, in such case, shall be at least thirty days from the day of the first publication of such notice.

If the owner of the property be known to the distrainer, or, if any person be known to him as claiming any interest in such property, and if such owner or person reside within the county, the distrainer shall also serve a copy of such notice, within two days thereof, either personally on such owner or person; or, in case of his absence from his usual or last place of residence, by leaving the same at such residence, with a proper person.

Sale by Sheriff, or Constable.—If such goods and chattels be not removed, and if the damages so certified be not paid, together with the fees of the appraisers, and the expenses of such notice, the distrainer shall apply to the sheriff of the county, or one of his deputies, or to any constable of the town, to sell such goods and chattels, and shall make and deliver to such officer, an affidavit showing his compliance with the foregoing provisions of the statute, and the original certificate of the appraisers. Such officer shall thereupon proceed and sell the goods and chattels so distrained, in the same manner as on execution against personal property in civil cases, and with like authority and effect, and shall be entitled to the same fees for his services, and shall retain from the proceeds his own fees, and pay to the distrainer the amount of the damages so certified, and the expenses of such notices, and also all expenses that may have been necessarily incurred, in the safe keeping and preservation of such property, which expenses shall be ascertained and certified by any judge of the county courts, or by a justice of the peace of the county. If any balance shall remain, such officer shall pay the same to the county treasurer, for the use of the owner of such property, or his legal representatives.¹

¹ 3 R. S. (5th ed.), 842, 841, 843; id. (6th ed.), 832, 831, 833; id. (7th ed.), 2445, 2444, 2446.

15. *Summoning Jurors Under the Act to Incorporate Plank-road and Turnpike Companies.*

In these cases where a purchase cannot be made of the lands required, on the proper proceedings being had, the county judge before whom the same are instituted issues a precept directed to the sheriff of the county, or to either of his deputies, or to any constable of the county, to summon the jurors drawn by said judge, to attend at a time and place therein specified; and from time to time, in case of the absence or inability of any juror directed to be summoned, such judge may draw, and direct to be summoned, as many as in his opinion may be needed to secure the attendance of twelve.

Every juror named in any such precept, shall be summoned personally, or by leaving at his residence a notice containing the substance of such precept, at least four days before the day therein specified for his attendance. The officer serving such precept, shall return it to the said judge, with an affidavit of the manner of serving the same, and of the distance necessarily traveled by him for that purpose; and such officer shall receive for making such service, six cents a mile for the distance so traveled.¹

16. *Proceedings to Remove Officers by Governor.*

These proceedings may be had before the governor himself, or a commissioner appointed by him for that purpose, and the governor may direct the attorney general, or the district attorney of the county where the officer sought to be removed resides, to conduct the inquiry. The attorney general or district attorney may issue subpoenas, and the governor or commissioner may enforce obedience thereto, and the person sought to be removed is entitled to subpoenas, in the same manner as in such cases before a county judge.

All sheriffs, coroners, constables and marshals, to whom process may be directed and delivered under the provisions of this act, shall execute the same without unnecessary delay.²

¹ 2 R. S. (5th ed.), 496; id. (6th ed.), 274; id. (7th ed.), 1330, 1331.

² Laws 1866, chap. 629; 1 R. S. (7th ed.), 373, 374.

SECTION III.

THEIR DUTIES IN CERTAIN CASES.

1. *Sale of Real Estate under Decrees.*

In what Cases.—In all cases where provision is not otherwise made by law, real property adjudged to be sold, must be sold by the sheriff of the county where it is situated, or by a referee appointed by the court for that purpose.¹

This provision includes such judgments in actions for partition and dower,² for the foreclosure of mortgages, and for waste, and judgments in any other action in which it is decreed that real estate be sold; and unless a referee is named and appointed in the decree for the purpose of making such sale, it is the duty of the sheriff to execute it, although he be not designated therein.

Sale; Manner and Notice of.—The sale must be at public auction, and to the highest bidder. Notice of the sale must be given in the same manner as on the sale of real estate by a sheriff under an execution, unless the property is situated wholly or partly in a city in which a daily newspaper is published, and, in that case, by publishing notice of the sale at least twice in each week for three successive weeks, immediately preceding the sale in one, or in the city of New York or the City of Brooklyn, in two such papers.³ In the case of lands in the city of New York or Brooklyn, the sale must be had between twelve o'clock at noon and three in the afternoon, unless otherwise directed.⁴ The sale must always be had in the county where the lands are situated,⁵ and in the city of New York, unless otherwise specially directed, the sale must take place at the Exchange Sales Rooms, now located at No. 111 Broadway in said city.⁶ In case of a postponement of the sale, notice thereof must be published in the same paper or papers wherein the original

¹ Code Civ. Pro., § 1242; Laws 1869, chap. 569, as amended by Laws 1874, chap. 192.

² Code Civ. Pro., §§ 1560, 1619.

³ Code Civ. Pro., § 1678.

⁴ Rule 62, Sup. Ct.

⁵ Code Civ. Pro., § 1242

⁶ Rule 62, Sup. Ct

notice was published,¹ the original notice, with a notice of the postponement at the foot thereof, should be so published, until the time of sale, and any second or further postponement in the same manner.

The notice of sale should contain the title of the action, but need not therein insert the names of all the plaintiffs and defendants, where there are more than one, it being sufficient in such case, to name the first plaintiff or defendant, and add thereto "and others." The notice must describe the real estate to be sold with sufficient certainty, and such description is usually, and very properly, copied from the decree itself.

At the time of the sale, the terms of sale must be made known, and if the property, or any part thereof, is to be sold subject to a right of dower, charge, or lien, that fact must be declared. It is proper, and sometimes required by the decree, to have the terms of sale published with the notice. If the property consists of two or more distinct buildings, farms, or lots, they shall be sold separately, unless otherwise ordered by the court; but where two or more buildings are situated on the same city lot, they may be sold together.² In the city of New York, such sales shall be subject to such regulations as the Supreme Court, superior court, and court of common pleas in said city, may establish.³

Neither the sheriff, nor any person for his benefit, shall directly, or indirectly, purchase, or be interested in the purchase of, any of the property sold, and a violation of this prohibition is made a misdemeanor.⁴

Where terms of credit are allowed in partition cases, the judgment of sale must regulate the same,⁵ and the purchase money for which such credit is allowed must always be secured at interest, by a mortgage upon the property sold, with a bond of the purchaser; and by such additional security, if any, as the court prescribes. The sheriff may take separate mortgages, and other securities, in the name of the county treasurer of the county in which the property is situated, for such convenient portions of the purchase

¹ Code Civ. Pro., § 1678.

² Code Civ. Pro., § 1678.

³ Rule 62, Sup. Ct.

⁴ Code Civ. Pro., § 1679.

⁵ Code Civ. Pro., § 1573.

money, as are directed by the court to be invested ; and in the name of the owner, for the share of any known owner of full age, who desires to have it invested.¹

The sheriff should have prepared a written memorandum of sale, containing a description of the property to be sold, and the terms and conditions of sale, which he should require the purchaser to sign upon the premises being struck off to him ; having at the commencement of the sale announced that such signing would be required.

Conveyance.—The sheriff on making the sale must execute a conveyance to the purchaser,² either at once, or upon his report of sale having been confirmed, and an order directing such conveyance having been made. In this matter, as well as in other respects, he is guided by the decree under which he sells, which, in partition cases, directs him to first make to the court a report of his proceedings up to, and including, the sale, and upon a confirmation thereof to execute a conveyance ; upon this report an order is made confirming the sale and directing a conveyance. In these cases, if the decree do not provide for it, the sheriff should require a sufficient percentage to be paid down on the day of sale to guarantee the good faith of the bid. In foreclosure cases the sheriff makes a conveyance without report of sale, as the decree in such cases will direct.

The conveyance should recite the judgment, and orders, if any, under which it is made, and briefly, the proceedings thereunder, and where the judgment specifies the particular party, or parties, whose right, title, or interest, is directed to be sold, must distinctly state, in the granting clause, whose right, title, or interest, was sold, and is conveyed, without naming, in that clause, any of the other parties to the action ; otherwise the purchaser need not accept it, and the sheriff is liable for the damages sustained by the purchaser for the omission.³ Form of conveyance given herein will be a sufficient guide to the sheriff. (See Forms.)

Report of Sale.—As has been already said, the judgment will contain the proper directions to the sheriff, and in all cases will require a report of sale to the court,⁴ either before

¹ Code Civ. Pro., §§ 1574, 1575.

² Code Civ. Pro., § 1244.

³ Code Civ. Pro., § 1242.

⁴ Code Civ. Pro., §§ 1576, 1625.

or after conveyance; and where it is required before conveyance, another and final report must be made. Where the report is not required until after conveyance, it must contain all proceedings had in execution of the judgment, including the sale, conveyance and disposition of proceeds of sale, and where there has been a report of the sale before conveyance, the final report must contain the proceedings after sale, including the conveyance and disposition of proceeds. These reports must be under oath, and as well as the deed, are usually prepared by the plaintiff's attorney.

Disposition of Proceeds.—Here again it will be found that the decree provides for the disposition of the proceeds of the sale, and that the sheriff will simply have to follow the directions of the court in regard thereto. If, however, the decree should omit to direct him so to do, and does not otherwise direct, in actions for partition, dower or to foreclose a mortgage, the sheriff must, out of the proceeds of the sale, pay all taxes, assessments and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not apparently become absolute, and the sums so by him paid will be allowed as and deemed expenses of the sale.¹

After confirmation of sale in partition, the costs of each party to the action, and the expenses of the sale, including the officer's fees, must be deducted from the proceeds of the sale, and each party's costs must be paid to his attorney;² the balance of such proceeds must be paid as directed by the decree.

In mortgage foreclosures, where there is a surplus, after paying the expenses of the sale and satisfying the mortgage debt, and costs of the action, it must be paid into court within five days after it is received, for the use of the person or persons entitled thereto, unless the judgment otherwise direct. Such payment into court is made by payment to the county treasurer, except in New York city where it is paid to the city chamberlain.³

¹ Code Civ. Pro., § 1676.

² Code Civ. Pro., § 1579

³ Code Civ. Pro., §§ 1626, 1633; Rule 61, Sup. Ct.

In all cases the costs of the action, as entered in the judgment, or taxed by the clerk of the court, and the expenses of the sale, including the sheriff's fees, must first be deducted from the proceeds of the sale.

In disposing of the proceeds of sale, the sheriff must take receipts for all payments made therefrom, which must be annexed to his report of sale, or final report, as the case may be.

Stay of Sale in Mortgage Cases.—In case of a judgment directing a sale in an action to foreclose a mortgage, upon which a portion of the principal or interest is due, and another portion of either is to become due, if the defendant, before the sale, pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but upon a subsequent default in the payment of principal or interest, the court may make an order, directing the enforcement of the judgment, for the purpose of collecting the sum then due.¹

2. Elections.

Notice of.—Notices of elections are delivered by the secretary of state, or board of State canvassers, to the sheriff; and, as the statute stood prior to 1860, it was the duty of the sheriff of each county, on receiving such notice, to deliver a copy thereof to the supervisor, or one of the assessors, of each town or ward in his county, without delay, and also to cause a copy of such notice to be published in all the public newspapers in his county, once in each week until the election therein specified; and if there be none printed in his county, then in some newspaper of an adjoining county. Chapter 480 of the Laws of 1860, has substituted for section fourteen, above recited, a provision applicable only to the county of New York. The sixth edition of the Revised Statutes, however, still retains the section as it stood prior to 1860. There does not appear, therefore, to be any statute requiring the sheriff to publish such notice, as formerly he was required to do.²

¹ Code Civ. Pro., § 1635.

² 1 R. S. (7th ed.), 383 § 14; Laws 1860, chap. 490; 1 R. S. (6th ed.), 431, § 14; id. (5th ed.), 422, § 14.

In the county of New York the sheriff, on receiving such notice of election as aforesaid, must, without delay, deliver a copy of such to the board of supervisors of said county, and to each supervisor of said county, and shall cause a copy thereof to be published once in each week until the election therein specified, in such newspapers in said county, not exceeding fifteen, having the largest circulation in the county.¹

Order of Inspectors.—Boards of inspectors of elections have authority to maintain order during an election and canvass; and if any one shall refuse to obey the lawful command of the inspectors, or, by disorderly conduct in their presence and hearing, shall interrupt or disturb their proceedings, they may make an order directing the sheriff, or any constable of the county, to take the person so offending into custody, and detain him until the final canvass of the votes shall be completed; but such order shall not prohibit such offender from voting at such election. It is the duty of any sheriff or constable to execute such order on delivery thereof to him.² Justices of the peace presiding at town meetings, may make a parol order for the removal of any disorderly person disturbing the business of the meeting.³

Informing District Attorney of Offenses.—It is the duty of sheriffs and constables, knowing of the commission of any offense against the election law, or having good reason to believe that an offense has been committed, to give information thereof to the district attorney of the county where the offense was committed.⁴

3. *Compelling the Attendance and Testimony of Witnesses.*

Under the Code of Civil Procedure.—In addition to proceedings for contempt in disobedience to a subpoena, where a subpoena, issued by and under the hand of a judge, arbitrator, referee, or other person, or a board or committee, authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which

¹ Laws 1860, chap. 480; 1 R. S. (7th ed.), 382, § 14.

² 1 R. S. (5th ed.), 433; id. (6th ed.), 438; id. (7th ed.), 388.

³ *Parsons v. Brainard*, 17 Wend., 522.

⁴ 1 R. S. (5th ed.), 449; id. (6th ed.), 453; id. (7th ed.), 400.

proofs may be taken, or the attendance of a person as a witness may be required, or to require a person to attend either before him or it, or before another judge or officer, or a person designated in a commission issued by a court of another State or country, to give testimony or to have his deposition taken, or to be examined, has been duly served, and the person subpœnaed fails to attend, the person issuing the subpœna, if he is a judge of a court of record or not of record, or, if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county, commanding him to apprehend the defaulting witness, and bring him before the officer, person or body, before whom or which his attendance was required.¹ If the person subpœnaed and attending, or brought as just stated, before an officer or other person or a body, refuses, without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper, which he was directed to bring by the terms of the subpœna, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpœna, if he is a judge of a court of record, or not of record, may forthwith, or, if he is not, then any judge of such court may, upon proof by affidavit of the facts by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do, or is discharged according to law.²

The Warrant to Apprehend; Commitment.—A warrant issued, as above, for the apprehension, or commitment, of a person, must be directed to the sheriff of the county where the person is, and must be executed by him, in the same manner, as a similar mandate issued, by a court of record, in an action;³ and such warrant of commitment must specify particularly the cause of the commitment; and if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.⁴

Where Foregoing not Applicable.—The foregoing provisions do not apply to a subpœna issued by a justice of the peace; or to a witness subpœnaed to attend a court held by

¹ Code Civ. Pro., §§ 855, 854.

² Code Civ. Pro., § 856.

³ Code Civ. Pro., § 858.

⁴ Code Civ. Pro., § 857.

a justice of the peace ; or to a case where special provision is otherwise made by law, for compelling the attendance of a witness.¹

Subpœna duces tecum.—A person shall not be compelled to produce, upon a trial, or hearing, a book of account otherwise than by an order requiring him to produce it, or a subpœna *duces tecum*, such a subpœna must be served at least five days before the day when he is required to attend. Where such book, or paper, belongs to, or is under the control of a corporation, its production may be compelled by a subpœna *duces tecum*, or order directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book, or paper, is.

Where such order, or subpœna, requires a public officer to attend and bring a book, or paper, under his control, it is sufficiently obeyed, if the book, or paper, is produced by a subordinate officer, or employee, of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used ; and where the personal attendance of a particular officer of the corporation, or public officer, is required, a subpœna, without a *duces tecum* clause, must also be served upon him.²

Supervisor's Subpœna and Proceedings on.—The chairman, or president, of the board of supervisors in any county, may, whenever the board deems it necessary or important to examine any person as a witness, upon any subject or matter within the jurisdiction of such board, or to examine any officer of the county in relation to the discharge of his official duties, or to use or inspect any book account, voucher or document, in the possession of such officer or other person, or under his control, relating to the affairs or interests of such county, issue a subpœna for such person or officer, which may contain a clause requiring the production of such books or papers. It is the duty of the sheriff, or any deputy or constable of the county, to whom such subpœna is delivered, to serve the same by reading it to the person named therein, and at the same time delivering to him a copy thereof.

¹ Code Civ. Pro., § 859.

² Code Civ. Pro., §§ 866-869.

And whenever such board appoints a committee with power to send for persons and papers, the chairman of such committee may issue a like subpoena.

Whenever a person subpoenaed as aforesaid, refuses or neglects to appear, or to produce books and papers, or to testify, or to answer any question which a majority of such board or committee shall decide to be proper and pertinent, he shall be deemed in contempt, and the chairman of such board or committee shall report the facts to the county judge or to a judge of the Supreme Court, or of the superior court, or of the court of common pleas of any of the cities of this State, who shall thereupon issue an attachment in the form usual in the court of which he shall be judge, directed to the sheriff of the county where such witness was required to appear and testify, commanding the said sheriff to attach such person, and forthwith bring him before the judge by whose order such attachment was issued.

On the return of such attachment, and the production of the body of the defendant, the same proceedings shall be had, and the same penalties imposed and punishment inflicted, as in case of a witness subpoenaed to appear and give evidence, on trial of a civil cause at circuit or special term of the Supreme Court.

In case of an arrest as aforesaid, the defendant shall not be discharged from arrest until he shall have entered into a bond to the board of supervisors of the county, in the penalty of \$250, with two sufficient sureties to be approved by the said judge, with a condition that he will appear and submit to an examination before such board or committee, at the time and place to which it shall have adjourned.¹

4. *Military Code, Duties Under.*

Warrants for Collection of Fines; Imprisonment Under.

—The president of a court martial shall, for the purpose of collecting any fines, or penalties, imposed by such court under the provisions of the military code, within fifteen days after the expiration of the time for an appeal (the time for such appeal being within twenty days after the fine, or penalty, has been announced in published orders), where

¹ 1 R. S. (5th ed.), 853; id. (6th ed.), 879; 2 id. (7th ed.), 934.

such fines, or penalties, have been approved, make a list of all the persons fined, describing them distinctly, and showing the sums imposed as fines, or penalties, on each person, and shall draw his warrant, under his official signature, directed to any marshal of the court, or to the sheriff, or constable, of any city or county (as the case may be), thereby commanding him to levy such fines, or penalties, together with the costs, on the goods and chattels of such delinquents; and, in default of such sufficient goods and chattels to satisfy the same, then to take the body of such delinquent and convey him to the common jail of such city or county, whose jailer shall keep the said delinquent closely confined, without bail, or main prize, for two days, for any fine, or penalty, not exceeding two dollars, and two additional days for every dollar above that sum, unless the fine, or penalty, together with the costs and the jailer's fees, be sooner paid; but no such imprisonment shall extend beyond the period of twenty days; provided, however, that the prisoner may be liberated at any time by order of the commandant of the brigade to which he belongs; and in case of a prisoner belonging to a separate troop, battery, or company attached to a division, or brigade, then by order of the commandant of the division, or brigade.

Execution of Warrant.—The officer to whom such list and warrant is directed and delivered is authorized and required to execute the same by levying and collecting the fines, or penalties, within forty days from the receipt of such warrant, and make return thereof to the officer who issued the same.

The warrant may be renewed in the same manner that executions in justice's courts may by law be renewed, by the officer who issued it, at any time within two years from the time of imposing the fines, or a new warrant issued, in cases where the officer shall not be able to collect the fine, or penalty, within the time specified in the warrant.

Any refusal, or willful neglect, on the part of such officer to execute such warrant, as required, shall subject him to a fine of double the amount named in the warrant, and the president of the court martial may prosecute therefor against the offending officer, and his surety, in any court in the State having jurisdiction in civil actions.

The fine, or penalty, collected shall be paid to the county treasurer, if against any officer, non-commissioned officer, musician, or private, of a regiment, battalion, troop, battery, or company; if against any other commissioned officer, it shall be paid to the treasurer of the State.

Preserving Order, and Attachment for Witness.—The president of every court martial, and of every court of inquiry, who shall be the member of the court, senior in rank, both before and after he shall have been sworn, and also the judge advocate, if required, have authority to issue subpoenas for witnesses. The president of a court martial has the power to preserve order, and to compel the attendance of witnesses, and all sheriffs, jailers, and constables, are required to execute any precept issued by such president, or court, for that purpose; and whenever it shall appear to the satisfaction of such court martial, or court of inquiry, by proof made before such court, that any person duly subpoenaed to appear as a witness before said court, has refused, or neglected, without just cause, to attend as such witness, in conformity to such subpoena, and the party in whose behalf such witness shall have been subpoenaed shall make oath that the testimony of such witness is material, such court, or the president thereof, shall have power to issue an attachment to compel the attendance of such witness.

Every such attachment shall be executed in the same manner as a warrant, and by any officer authorized to execute warrants, and the fees of the officer serving the same shall be paid by the person against whom the same shall have been issued, unless he shall show reasonable cause, to the satisfaction of such court, for his omission to attend. Such costs shall be ascertained by the court, who may thereupon issue an execution for the collection against the person liable to pay the same, and which may be collected as other executions are collected, and by any officer authorized to collect executions issued from courts of justice.

Any person or persons who shall be guilty of disorderly, contemptuous or insolent behavior in, or use any insulting or contemptuous or indecorous language or expressions to or before any court martial or court of inquiry, or any mem-

ber of either of such court, in open court, intending to interrupt the proceedings, or to impair the respect or authority of such courts, may be committed to the jail of the county in which said courts shall sit, by warrant under the hand and seal of the president of such court. Such warrant shall be directed to the sheriff, or any or either of the constables and marshals of any county, or any officer attending the court, and shall set forth the particular circumstances of the offense adjudged to have been committed; and shall command the officer, to whom it is directed, to take the body of such person and commit him to the jail of the county, there to remain without bail or main prize, in close confinement for a time, to be limited, not exceeding three days, and until the officer's fees for committing and the jailer's fees be paid. Such sheriff shall receive the body of any person who shall be brought to him by virtue of such warrant, and keep him until the expiration of the time mentioned in the warrant, and until the officer's and jailer's fees shall be paid, or until the offender shall be discharged by due course of law, unless sooner discharged by any judge of a court of record, in the same manner and under the same rules as in cases of imprisonment under process for contempt from a court of common-law jurisdiction.

Penalties for Neglect of Duties.—Any civil or military officer who shall neglect or refuse to perform any of the duties required of him by the provisions of the military code, shall forfeit and pay the sum of not less than \$25 nor more than \$100 for each and every offense, to be recovered in the name of the people of the State of New York; and, for a willful neglect or refusal, shall be deemed guilty of a misdemeanor, punishable by fine and imprisonment, according to the aggravation of the offense. And if any such officer shall embezzle, misapply or retain in his possession, without authority, any of the public money appropriated for purposes over which he may have control, he shall be deemed guilty of a felony.¹

¹ 1 R. S. (6th ed.), 807, 808, 809, 815; id. (7th ed.), 779, 780, 781, 782, 789; Laws 1870, chap. 80 (as amended).

5. *State and Indian Lands.*

Trespassing on State Lands.—It is the duty of the district attorney of the county in which any person shall intrude upon waste or ungranted lands of the State, under pretense of any claim inconsistent with the sovereignty and jurisdiction of the State, to immediately report the same to the governor, who shall thereupon by a written order, direct the sheriff of the county to remove such intruders from said lands, whereupon the sheriff shall execute such order; and in case of resistance made or threatened, he may call to his aid the power of the county, as in cases of resistance to the writs of the people.¹

Removing Occupants of Public Lands on Re-Sale.—Whenever, pursuant to statute, the commissioners of the land office shall direct a re-sale of lands, in case of a default in payment on a previous sale thereof, they shall cause notice to be given to every occupant of such land to remove therefrom; and in case of his refusal or neglect to comply with such notice, they shall direct the district attorney of the county in which such lands may be situated, to enter a complaint against such occupant, before the county court of the county. The said court shall proceed to examine into the matter, and on proof by the production of a certificate from the clerk of the commissioners of the land office, that a re-sale of such land has been duly ordered for default of payment, shall issue a warrant to the sheriff of the county, commanding him, within ten days after the receipt thereof, to remove such occupant from such lands; and it shall be the duty of the sheriff, within the time specified in the warrant to remove such person, and for that purpose he shall have the same powers as in the execution of criminal process. The sheriff shall retain such warrant in his hands, and if any person so removed shall return, to settle or reside upon such lands, without the consent of the surveyor general, such person shall be forthwith removed by the sheriff, pursuant to the warrant, and shall also be deemed guilty of a misdemeanor, and be liable on conviction to be fined or imprisoned; the fine not to exceed \$100, and the imprisonment not to exceed thirty days.

¹ 1 R. S. (5th ed.), 84; id. (6th ed.), 127; id. (7th ed.), 138, 139.

The sheriff, for executing every such warrant, shall be allowed such compensation as the comptroller shall certify to be reasonable, which fees shall be paid out of the treasury.¹

Reporting Trespassers on State and Indian Lands.—The commissioners of the land office may require the sheriff of any county in which lands belonging to the people of this State, for which patents shall not have been issued, or any Indian lands, may be situated, to examine and report to them and to the district attorney of his county, any trespasses that may be committed on such lands, by cutting or carrying away the timber thereon.²

Imprisonment on Execution upon Judgments for Penalties.—Whenever execution shall be issued upon judgments recovered in actions for penalties for trespassing on any land belonging to the people of this State, or any Indian lands, by cutting or carrying away timber growing thereon, and the body of any defendant shall be arrested thereon, he shall be imprisoned according to law, without being entitled to the liberties of the jail.³

Indian Lands, Intrusion on.—It is the duty of a sheriff of a county in which are Indian lands, to execute, within ten days after its receipt, any warrant issued by the county court of such county, directing the removal of any person or persons other than Indians, who have settled on such lands; and for that purpose he shall have and possess the same powers as in the execution of criminal process, and shall be allowed such compensation as the comptroller shall certify to be reasonable, to be paid by the treasurer on the comptroller's warrant.

If any person or persons, so removed, shall return to settle or reside upon any such lands, the county court, upon conviction of such offense, may direct its warrant to the sheriff of said county, commanding him to arrest such person or persons forthwith, and to commit him or them to the common jail of the said county, there to remain for the space of thirty days; and such sheriff shall accordingly

¹ 1 R. S. (5th ed.), 550; id. (6th ed.), 600; id. (7th ed.), 570.

² 1 R. S. (5th ed.), 553; id. (6th ed.), 603; id. (7th ed.), 575.

³ 1 R. S. (5th ed.), 554; id. (6th ed.), 604; id. (7th ed.), 575.

arrest and commit such person or persons to the said common jail for the term aforesaid, there to remain without bail, and without being entitled to the jail liberties. Such conviction is final, and cannot be reviewed by *certiorari* or otherwise.¹

6. *Comptroller's Notifications and Warrants.*

Notifications.—Whenever the comptroller shall deem it expedient, he shall issue a notification, in the name of the people of this State, to any person who shall have received moneys belonging to the State, for which he shall not have accounted. In case of the death of such person, the notification shall be directed to his legal representatives. Such notification shall require, that within a limited period, not less than sixty nor more than ninety days from the date thereof, all the accounts and vouchers, for the expenditure of such moneys, shall be rendered to the comptroller. Such notification shall be served by the sheriff of the county where the person, to whom the same shall be directed, shall reside, by delivering a copy thereof to him, or by leaving such copy at his usual place of abode, at least forty days before the time limited in the notification for rendering such accounts and vouchers. The return of such notification to the comptroller's office, with the certificate of the sheriff indorsed thereon, that the service has been made, in the manner aforesaid, shall be conclusive evidence of the proceedings.²

Warrant Against Collector of Canal Tolls.—If any collector of tolls shall neglect to deposit, according to law and the directions of the comptroller, the moneys, that, from the abstracts of returns made to the comptroller, he shall appear to have collected for tolls, the comptroller may issue a warrant, under his hand and seal, directed to the sheriff of any county where such collector, or any of his sureties, may be found, thereby commanding such sheriff to cause the amount of tolls in the hands of such collector (or such part thereof as the comptroller shall direct by the warrant), to be made and levied of the goods and chattels, lands and

¹ 2 R. S. (6th ed.), 1043, 1044; 1 id. (7th ed.), 286, 287; Laws 1821, chap. 204.

² 1 R. S. (5th ed.), 481; id. (6th ed.), 531; id. (7th ed.), 468.

tenements of such collector ; and in case the same shall not be sufficient, then of the goods and chattels, lands and tenements of the sureties of such collector ; and to return the money, together with the warrant and his doings, thereon, to the comptroller, within sixty days from the date thereof.

The sheriff to whom such warrant shall be directed, shall immediately cause the same to be executed ; and may demand and collect the same fees for executing the same, as are allowed by law for the service of executions issued out of the Supreme Court.¹

Attachment on Neglect to Return Warrant.—Whenever any sheriff shall have neglected to return any such warrant issued by the comptroller, or shall have made any other return than that required by law, he shall be proceeded against in the Supreme Court, by attachment, for his neglect, in the same manner and with the like effect, as for neglecting to return any execution in a civil suit ; and the proceedings thereon shall be the same in all respects.²

7. Collection of Taxes.

County Treasurer's Warrant.—When it shall appear by the return of any collector, made according to law, to a county treasurer, that any tax imposed under the provisions of the act in regard to the taxation of rents reserved in leases in fee, or for one or more lives, or for a term exceeding twenty-one years, remains unpaid, such county treasurer shall issue his warrant to the sheriff of any county where any real or personal property of the person upon whom such tax is imposed may be found, commanding him to make of the goods and chattels and real estate of such person the amount of such tax, together with one dollar for the expense of issuing such warrant, and to return the said warrant to the treasurer issuing the same, and to pay to him the money which shall be collected by virtue thereof by a certain time therein to be specified, not less than sixty days from the date of such warrant.

Such warrant shall be a lien upon, and shall bind the real and personal estate of the person against whom the same

¹ 1 R. S. (5th ed.), 620, 621; id. (6th ed.), 689; id. (7th ed.), 674.

² 3 R. S. (5th ed.), 870; id. (6th ed.), 863; id. (7th ed.), 2459.

shall be issued, from the time an actual levy shall be made by virtue thereof; and the sheriff, to whom such warrant shall be directed, shall proceed upon the same, in all respects, with the like effect, and in the same manner as prescribed by law, in respect to executions against property issued by a county clerk upon judgments rendered by a justice of the peace, and shall be entitled to the same fees for his services in executing the same, to be collected in the same manner.

Neglect to Return Warrant.—In case of the neglect of any sheriff to return such warrant according to the directions therein, or to pay over any money collected by him in pursuance thereof, he shall be proceeded against in the Supreme Court, by attachment, in the same manner and with like effect, as for similar neglects in reference to an execution issued out of the Supreme Court in a civil suit, and the proceedings thereon shall be the same in all respects.¹

Treasurer's Warrant for Tax on Debt Owning to Non-resident.—When it shall appear by the return of any collector, made according to law to a county treasurer, that any tax imposed on a debt owing to a person not residing in the United States, remains unpaid, such county treasurer shall, after the expiration of twenty days from the return of such collector, issue his warrant to the sheriff of any county in this State, where any debtor of said non-resident creditor may reside, commanding him to make of the goods and chattels and real estate of such non-resident, the amount of such tax, to be specified in a schedule annexed to the said warrant, together with his fees and the sum of one dollar for the expense of issuing such warrant, and to return the said warrant to the treasurer issuing the same, and to pay over to him the money which shall be collected by virtue thereof, except the said sheriff's fees, by a certain day therein to be specified, within sixty days from the date of such warrant.

The taxes upon several debts owing to the non-resident shall be included in one warrant, and the taxes upon several debts owing to different non-residents may be included in

¹ 1 R. S. (5th ed.), 940, 941; id. (6th ed.), 945, 946; 2 id. (7th ed.), 998, 999; Laws 1846, chap. 327 (as amended by chap. 809, Laws 1873).

the same warrant. The sheriff shall be directed to levy the sums specified in the schedule thereto annexed, upon the personal and real property of the non-residents respectively, opposite to whose names, respectively, such sums shall be written, together with the sum of fifty cents upon each non-resident, for the expense of such warrant.

Such warrant shall be a lien upon, and shall bind the real and personal estate of the non-resident against whom the same shall be issued, from the time an actual levy shall be made upon any property by virtue thereof; and the sheriff, to whom such warrant shall be directed, shall proceed upon the same, in all respects, with the like effect, and in the same manner as prescribed by law in respect to executions against property, issued upon judgments rendered in the Supreme Court, and shall be entitled to the same fees for his services in executing the same, to be collected in the same manner.

Neglect to Return Warrant.—In case of the neglect of any sheriff to return such warrant according to the direction therein, or to pay over any money collected by him in pursuance thereof, he shall be proceeded against in the Supreme Court, by attachment, in the same manner, and with the like effect, as for similar neglects in reference to an execution issued out of the Supreme Court in a civil suit, and the proceedings thereon shall be the same in all respects.¹

Treasurer's Warrant for Taxes Against Persons Removed from the County.—Whenever it shall satisfactorily appear to the treasurer of any county in the State, that any State or county tax legally assessed within his county (not assessments on real estate of non-residents), cannot be collected by reason of the removal of the person so assessed to any other county of this State, it shall be lawful for the said treasurer to issue a warrant, under his hand and seal, and certified by the clerk of the county, that he is such treasurer, to any constable or sheriff of the county where such person resides, to collect the same out of the personal property of such person. Any sheriff or constable receiving such warrant, shall execute the same, and make the like

¹ 1 R. S. (5th ed.), 942, 943; id. (6th ed.), 977, 978; 2 id. (7th ed.), 983, 984; Laws 1851, chap. 371.

returns, and be entitled to the same fees, and subject to the same liabilities and penalties for neglect, as upon executions from any court.¹

Warrant by Supervisors on Failure of Collector to Give Bonds.—In case the collector of any town in this State shall neglect or refuse to execute his bond as required by law, or the supervisor of the town shall refuse or neglect to appear and file such bond within the time prescribed by law, and if no new collector shall have been appointed within ten days after the time for filing such bond as required by law has expired, the board of supervisors of such county are authorized and empowered to deliver the corrected assessment roll, or a copy thereof, with a warrant of said board of supervisors, or a majority of them annexed, to the sheriff of the county, who shall proceed in the collection of said taxes in like manner as collectors are now authorized by law to do, and with the like powers and subject to the same duties and obligations; such warrant shall require all payments therein specified to be made by such sheriff within sixty days after its receipt by him; and the expenses of such collection, if any, over and above the fees lawfully chargeable by the collector, to be audited by the board of supervisors, shall be a charge on the town.²

Other Warrants.—It is made the duty of sheriffs and constables to execute warrants for the collection of taxes, under local statutes or charters, in various cities and villages, but it is not deemed profitable to here follow the provisions of each of such local acts. The duties of the officer are the same generally, under such acts, as under the statutes of general application here spoken of.

When Warrant a Protection to Sheriff.—In all cases, where the officer issuing a warrant for the collection of taxes has jurisdiction of the subject matter, and such jurisdiction appears on the face of the warrant, and there is nothing appearing on the face thereof to show illegality or want of authority, such warrant is a full protection to the officer executing it.³

¹ 1 R. S. (5th ed.), 921; id. (6th ed.), 954; 2 id. (7th ed.), 1011; Laws 1836, chap. 461.

² 1 R. S. (5th ed.), 922; id. (6th ed.), 954; 2 id. (7th ed.), 1013; Laws 1857, chap. 585.

³ L. S. and M. S. R'y Co. v. Roach et. al., 80 N. Y., 339, 342.

In New York City.—As to the collection of taxes and assessments in New York city and county by the sheriff, special provision is made by sections 853, 855 and 891 of New York City Consolidated Act of 1882.

8. *County Treasurer's Warrants against Collectors.*

Warrant.—If any collector shall refuse or neglect to pay to the several town officers of his town, or to the county treasurer, the sums required by his warrant to be paid to them respectively, or either of them, or to account for the same as unpaid, the county treasurer shall, within twenty days after the time when such payments ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for by such collector, and in addition thereto all costs and fees for collecting, of the goods and chattels, lands and tenements of such collector, and to pay the same to the county treasurer, and return such warrant within forty days after the date thereof; which warrant the county treasurer shall immediately deliver to the sheriff of the county; but no such warrant shall be issued by the county treasurer for the collection of moneys payable to town officers, without proof, by the oath of such town officers, of the refusal or neglect of the collector to pay the same, or account therefor as above provided.¹

Execution and Return of Warrant; Fees on.—The sheriff to whom such warrant is directed, shall immediately cause the same to be executed, and make return thereof to the county treasurer, within the time therein specified, and shall pay to him the money levied by virtue thereof, deducting for his fees the same that he would be entitled to on an execution issued out of the Supreme Court.

If the whole sum due from the collector shall be collected, the sheriff shall so state in his return; but if a part only, or if no part of such sum shall be collected, the sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall certify that such collector has no goods

¹ 1 R. S. (5th ed.), 922, § 26; id. (6th ed.), 954, § 29; 2 id. (7th ed.), 1010, § 13, p. 1014; Laws 1862, chap. 194, § 1.

or chattels, lands or tenements in his county, from which the moneys, or the residue thereof, as the case may be, could be levied.¹

Sheriff's Neglect to make Return.—If any sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant; or shall make any other return than such as is provided by the statute as here given, the county treasurer shall forthwith proceed to collect, by attachment, the whole sum directed to be levied by such warrant. The attachment proceedings shall be in the Supreme Court, in the same manner and with like effect as for neglecting to return any execution in a civil suit; and the proceedings thereon shall be the same in all respects. Where the moneys cannot be collected of the sheriff by such attachment, the attorney general shall prosecute the sheriff and his sureties therefor.²

9. *Warrant to Obtain Possession of Canal Property, Books and Papers*

It shall be the duty of every agent, toll collector, lock-keeper, or superintendent, employed on any canal, and occupying any house, office, building, or land, belonging thereto, who shall be discharged from his employment, and of the wife and family, of every such person, who shall die in such employment, to deliver up the possession of the premises so occupied, and of all books, papers, matters or things belonging to the canals, acquired by virtue of his office, within seven days, after a notice shall have been served for that purpose, by the acting canal commissioner.

In case of a refusal or neglect to make such delivery, in either of the above cases, it shall be the duty of any justice of the peace, in the county where such premises shall be situate, upon application, to issue his warrant, under his hand and seal, ordering any constable, or other peace officer, with such assistance as may be necessary, to enter upon the premises so occupied, in the day-time, and remove there-

¹ 1 R. S. (5th ed.), 923, §§ 28, 29; id. (6th ed.), 955, §§ 33, 34; 2 id. (7th ed.), 1010, §§ 14, 15, p. 1014; Laws 1862, chap. 194, § 2.

² 1 R. S. (5th ed.), 923, §§ 31, 33; id. (6th ed.), 955, 956, §§ 36, 38; 2 id. (7th ed.), 1010, 1011, §§ 17, 19; 3 id. (5th ed.), 870, § 34; id. (6th ed.), 863, § 34; id. (7th ed.), 2459, § 32.

from all persons found in possession thereof, and to take into his custody all books, papers, matters and things there found, belonging to the canals, and to deliver the same to the acting canal commissioner, or his authorized agent; and the officer to whom such warrant shall be delivered, shall execute the same according to its purport.¹

10. *Warrant in Case of Refusal to Deliver up Official Books and Papers.*

Whenever any person shall be removed from office, or the term of his office expires, he shall, on demand, deliver over to his successor all the books and papers in his custody as such officer, or in any way appertaining to his office, and for a refusal, or neglect, so to do, such successor, on complaint and proof before any justice of the Supreme Court, or the county judge of the county where the person refusing resides, obtain an order for such person to show cause, before such justice or judge issuing the order, within some short and reasonable time, why he should not be compelled to deliver the same. If, on the return of such order, it appear that any such books or papers are withheld, the said justice or judge shall, by warrant, commit the person so withholding to the jail of the county, there to remain until he shall deliver such books and papers, or be otherwise discharged, according to law.

The same proceedings may also be had in the case of any person in office, dying, or his office becoming vacant in any way, against any person withholding the books and papers on demand by the successor.

In the cases here spoken of, a search warrant may also be issued, as we have already seen.²

11. *Abatement of Nuisance.*

Where a person is, on an indictment therefor, convicted of keeping, or maintaining, a public nuisance, and sentenced to punishment, the court, in addition to, or in place of other

¹ 1 R. S. (5th ed.), 638; id. (6th ed.), 704, 705; id. (7th ed.), 702.

² 1 R. S. (5th ed.), 416, 417; id. (6th ed.), 424, 425; id. (7th ed.), 376, 377. See *ante*, p. 123. (It will be noticed that the seventh edition of the Statutes does not correspond with the fifth and sixth as to the officer before whom such proceedings are had.)

punishment, may direct that the nuisance be abated, and issue an order to the sheriff of the county where such nuisance is maintained to execute the judgment, as therein directed, by abating such nuisance.¹

12. *Under Local Statutes.*

The duties of sheriffs in certain cases, under local statutes, are not within the scope of this work; as for instance, the duties of the sheriff of New York city and county in regard to theatres, criminal statistics, etc., etc.; and the sheriff of localities where such statutes are applicable, should make himself familiar with the same.

¹ Code Crim. Pro., § 953.

CHAPTER VI.

OF ACTIONS BY AND AGAINST SHERIFFS, AND HEREIN OF
BONDS FOR JAIL LIBERTIES, AND OF ESCAPES.

SECTION I.

OF ACTIONS BY SHERIFFS.

1. *For Fees and Compensation for Services.*

Against Whom Maintained.—A sheriff can maintain an action against the attorney who issues an execution to him, or against the party in whose favor it is issued, at his election, to recover such fees and poundage as he is legally entitled to, and not made by him out of the property of the debtor.¹

In *Campbell v. Cothran* (56 N. Y., 281), the Court of Appeals say: "It may well be doubted whether the rule laid down in *Adams v. Hopkins*" (liability of the attorney for fees of sheriff) "can be maintained upon principle, or is consistent with the general current of judicial authority elsewhere. But it has been for more than sixty years the law of this State. No practical injustice results from enforcing it, as attorneys act in view of the liability they incur in issuing executions, and it ought not now to be disturbed." And in *Judson v. Gray* (11 N. Y., 412), the same court say: "It is clear that the decisions in this State, in which attorneys and solicitors have been held liable for the fees of the officers of the court, upon a promise implied from their acts done as attorneys merely, are in conflict with principle, and with the whole current of authorities else-

¹ *Adams v. Hopkins*, 5 Johns., 252; *Campbell v. Cothran*, 56 N. Y., 279; *Benedict v. Wright*, 19 Hun, 27; *Ousterhout v. Day*, 9 Johns., 114; *Hildreth v. Ellis*, 1 Caines, 192; *Craft v. Merrill*, 14 N. Y., 456; *Bolton v. Lawrence*, 9 Wend., 435; *Parsons v. Bowdoin*, 17 id., 13.

where on the subject. In all such cases it is a sound and salutary rule that, while the court, for the mere sake of restoring the harmony and symmetry of the law, will not interfere to overthrow a doctrine which has, through a series of decisions, come to be universally regarded as fixed and settled, they will nevertheless circumscribe the anomaly within as narrow limits as possible. It is never admissible to extend such a rule by a resort to analogy; for the obvious reason that every new case, to which the erroneous rule is applied, affords the basis of a still wider departure from principle." The decision in *Adams v. Hopkins*, must rest exclusively upon the reason that the sheriff is bound to execute every legal process delivered to him, before he can demand his fees (except that he may demand, in advance, the fee for receiving and returning an execution).¹ Hence, all reasonable security ought to be extended to him, to insure a compensation for his services. He cannot be presumed to be acquainted with the residence, or responsibilities of parties. The attorney, however, *is not bound* to incur any expense, or undertake any suit, without security for costs and disbursements, including probable sheriff's fees. Therefore, it has seemed right to the courts to hold the attorney responsible for the fees of the sheriff, or any of his deputies, for the performance of any service, at the request of the attorney, which such officer is bound to perform before he can demand his fees. But if the sheriff can demand of the party his fees in advance, as in the case of the fee for receiving and returning an execution, the reason for holding the attorney liable fails, and, for such fee, the sheriff can only look to the party.

The fees of the sheriff, on execution, are but an incident of the judgment, and are gone on its payment and satisfaction, except in so far as the officer may claim them from the judgment creditor or his attorney.² He cannot collect them of the defendant by a sale of his property. Hence, after judgment is satisfied, the court will not, on motion, vacate the satisfaction merely to permit the sheriff to collect his

¹ Code Civ. Pro., § 3307, subd. 6.

² *Jackson v. Anderson*, 4 Wend., 474, 479; *Ousterhout v. Day*, 9 Johns., 114; *Parsons v. Bowdoin*, 17 Wend., 14; *Campbell v. Cothran*, 56 N. Y., 279.

fees and poundage on the execution issued before the satisfaction piece was filed.¹ An execution may, at any time, be countermanded by the attorney who issued it, and the sheriff is bound to obey his instructions and suspend proceedings upon the execution whenever he is directed so to do, unless it be a case of collusion between the parties for the obvious purpose of defrauding the sheriff out of his fees, the plaintiff and his attorney both being insolvent or irresponsible.² And even where the attorney does not personally intervene to prevent the sale after levy made, but the plaintiff expressly directs the sheriff not to sell, nevertheless the sheriff may maintain an action *against the attorney* for his fees.³

It has been held that wherever the law imposes a service upon the sheriff, and is silent as to the compensation therefor, the court, if it allows anything, must allow what the service is reasonably worth; and that a sheriff is entitled to reasonable fees and expenses for bringing up a former sheriff, on an attachment for a contempt in not returning process. And that he may maintain an action against such former sheriff, to recover such reasonable fees and expenses.⁴ The Court of Appeals, however, have criticised this decision, and seem inclined to regard the case as holding only that the charges made were just and reasonable, and not that the sheriff had a legal right to make the charges.⁵ As to what charges, if any, the sheriff may make for services rendered as directed by law, where the statute gives no specified fee, see the chapter on sheriff's fees.

Where a sheriff or officer recovers judgment against an attorney for his fees, and his execution thereon is returned unsatisfied, he cannot afterwards resort to the party. Having elected to hold the attorney liable for his fees, the party is released from his implied contract to pay them.⁶

Pleading and Evidence in Actions for Services.—In a complaint in an action brought by a sheriff for official ser-

¹ Bensen v. Perry, 17 Hun, 16.

² Jackson v. Anderson, 4 Wend., 474, 480.

³ Van Kirk v. Sedgwick, 23 Hun, 37; aff'd 87 N. Y., 265.

⁴ Smith v. Birdsall, 9 Johns., 328.

⁵ See Crofut v. Brandt, 58 N. Y., 114.

⁶ Ousterhout v. Day, 9 Johns., 114.

vices, it is not necessary to aver the value of the services rendered, where the law fixes their value. But where the value of the services is not fixed by statute, the complaint should aver what the services were reasonably worth, or that the court from which the process issued had certified that a certain amount was just and reasonable.¹ It is not necessary in such complaint to allege a demand. An allegation of a special request by the defendant, that the plaintiff should perform the services, is sufficient. Nor is it necessary to aver that the sums due the plaintiff, were not collected by the sheriff by a sale of property levied upon, if there was a levy under the process made.² The officer's own return is evidence, in his favor, of the service performed, concerning the performance of which the law requires him to make return. And in a case where, by the intervention of the judgment creditor or his attorney, a sale is prevented after levy made on an execution, the indorsement of the levy upon the execution is *prima facie* evidence of the levy, in favor of the officer who brings his action to recover his fees for such levy.³ It is a general principle that the certificate of an officer, when, by law, evidence for others, is competent testimony for himself, if at the time of making it, he was competent to act officially in the matter.⁴

It has been held in Ohio, and the rule doubtless is the same in this State, that an action will not lie, on behalf of a sheriff, to recover from a party to a judicial proceeding, expenses to which the sheriff has been subjected, in the care or removal of property in his possession by virtue of judicial process, not specially provided for by law, and to pay which the party has entered into no contract.⁵ Hence the pleading ought to show what services were rendered, for which a recovery is sought, so that it may appear, if so the fact is, that the law specially provides a compensation for the services alleged to have been rendered.

¹ Lane v. McElhany, 49 Cal., 422.

² Lane v. McElhany, *supra*.

³ Cornell v. Cook, 7 Cow., 309; Hyskill v. Givin, 7 Serg. & Rawle (Penn.), 369.

⁴ McKnight v. Lewis, 5 Barb., 681.

⁵ Mathers v. Ramsey, 2 Disney (Ohio), 334; and see Crofut v. Brandt, 58 N. Y., 106.

2. Actions under Warrants of Attachment and Levies.

As to Attached Property.—"The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects, and things in action, attached by him. He may maintain any action or special proceeding, in his own name, or in the name of the defendant, which is necessary, for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding, at such time and on such terms, as the court or judge directs."¹ This section, however, confers no authority upon the sheriff to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent. But is the office of a creditor's bill founded upon a judgment and execution.² The provision of the section limiting the right of the sheriff to discontinue actions brought by him, is for the protection of the parties interested in the subject attached, that there shall be no discontinuance by the sheriff to inure to their injury. Where those interested, to the extent of the surplus, to arise after payment of the judgment and costs from the attached property, would be injured by the sheriff's discontinuance of the proceedings, the court will require him to prosecute to judgment.³ A sheriff having several executions in his hands, issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for directions as to the disposition of moneys collected by him, by levy and sale, under the execution.⁴

For Interference with Property Levied Upon or Attached.—A sheriff, by virtue of a levy made under an execution, or by virtue of the seizure of property upon an attachment, acquires such an interest in the property levied upon or attached, as justifies him in bringing an action for an unlawful interference with such property.⁵ And the dam-

¹ Code Civ. Pro., § 655.

² *Thurber v. Blanck*, 50 N. Y., 80.

³ *O'Brien v. Mer. Ins. Co.*, 16 Abb. Pr. (N. S.), 212.

⁴ *Phillips v. Wheeler*, 67 N. Y., 104.

⁵ *Barker v. Miller*, 6 Johns., 195; *Barker v. Binninger*, 14 N. Y., 270, *Lockwood v. Bull*, 1 Cow., 322; *Dezell v. Odell*, 3 Hill, 215.

ages he may recover in such action are measured by the value of his interest in the property, which is the amount of the executions in his hands to the extent of the value of the property.¹ And where, after levy made, the property levied upon is wrongfully removed by a third party, and thereafter the execution is returned by the officer "*nulla bona*," he may obtain leave of the court to withdraw the execution from the files of the court, to cancel the return, and then bring an action for the conversion of the property.² The return does not divest the title acquired by the levy, or discharge the right of action for the conversion.³ Of course, the officer, to maintain an action for an interference with the goods must have the right to their possession; and this he cannot have, if they have been already levied upon by another officer, not one of his deputies. Thus, where property is levied upon by virtue of an attachment, and subsequently a second levy is made upon the same property under another attachment, the officer making the second levy is not entitled to maintain an action of trover against one unlawfully taking the property.⁴ And where, by order of the plaintiff in the execution, he has formally released a levy, and made a return accordingly, he cannot maintain an action against a stranger for an interference with the property levied upon.⁵ But the officer does not, by leaving the property with another and taking a receipt, part with his interest, nor with his right of possession. The receptor holds, as his delegate, or bailee, on the terms specified in the receipt. Upon the officer becoming entitled to a redelivery, according to those terms, the force of the receipt is completely gone. If the receptor detain the property, the officer may recover against him for such detention.⁶ Where a sheriff levies upon a partner's interest in co-partnership property, and the other members of the firm covenant with the sheriff to deliver to him the property on request, or pay the debt, it is no answer to an

¹ Dillenback v. Jerome, 7 Cow., 294; Spoor v. Holland, 8 Wend., 445.

² Barker v. Binninger, 14 N. Y., 270.

³ Barker v. Binninger, *supra*.

⁴ Dubois v. Harcourt, 20 Wend., 41; and see Seymour v. Newton, 17 Hun, 30.

⁵ Marsh v. White, 3 Barb., 518.

⁶ Dezell v. Odell, 3 Hill, 215; and see Dillenback v. Jerome, 7 Cow., 294.

action for breach of such covenant, that the property was partnership property, and had, subsequent to the covenant, been applied by them to the use of the co-partnership.¹ The right of the sheriff to take a receipt in which the receiptor covenants to return the property on request, *or pay the debt*, is well established at common law.² The exercise of such right is not an illegal act, done by color of office. By his covenant the receiptor is estopped from denying the sheriff's title, unless he has been evicted by title paramount in some third person; or unless, at the time of giving the receipt, he gives such notice to the sheriff of his rights, or the rights of a third person, in the property, that the sheriff cannot rightfully act and repose upon the admission of title in the judgment debtor which the giving of the receipt would imply.³ The receiptor when sued by the sheriff on a refusal to return the property on demand, having covenanted to pay the debt, if he did not return the property, will not be permitted to show that the property receipted for was of less value than the debt;⁴ or that he received less property than he receipted for.⁵ The measure of his liability is as broad as his covenant.

Evidence.—Regular process is a shield in the hands of an officer; but it is not an instrument of assault. Hence an execution, though valid on its face, if actually void, with an indorsement of levy thereon, will not be sufficient proof to make a *prima facie* case even as against one, who after the levy, obtains possession of the property levied upon, with no right thereto. If the officer took *actual possession* of the property under the levy, proof of that fact in connection with the production of an execution, valid on its face, will, in such case, be sufficient *prima facie* to sustain the action.⁶

¹ Burrall v. Acker, 23 Wend., 606; Staples v. Fillmore, 43 Conn., 510.

² Burrall v. Acker, *supra*; Cornell v. Dakin, 38 N. Y., 253; People v. Reeder, 25 id., 302.

³ Burrall v. Acker, 23 Wend., 606; Dezell v. Odell, 3 Hill, 215; Cornell v. Dakin, 38 N. Y., 253; Clark v. Weaver, 17 Hun, 481; and see Perry v. Williams, 39 Wis., 339.

⁴ Cornell v. Dakin, 38 N. Y., 253; Euscoe v. Dunn, 44 Conn., 93; Spear v. Hill, 52 N. H., 323; Stimson v. Ward, 47 Vt., 624.

⁵ Bowley v. Angire, 49 Vt., 41.

⁶ Dunlap v. Hunting, 2 Denio, 643; Spoor v. Holland, 8 Wend., 445; Barker v. Miller, 6 Johns., 195; Blackley v. Sheldon, 7 id., 32; Coon v. Congden, 12 Wend., 496.

But the character of the officer's possession can always be inquired into and attacked; and the invalidity of the process, and the judgment upon which it was issued may be shown. An execution upon a void judgment gives no title, and actual possession of property under it will not sustain an action as against one so connected with the true title, as that the law would defend him in the possession.¹ A valid judgment must be shown. Thus, when a constable took possession of property, by virtue of attachments, valid on their face, but actually void, and, thereafter, a sheriff took the property from the possession of the constable under and by virtue of a *valid* attachment, the constable cannot recover the property of the sheriff, the latter having the better title thereto.²

Upon Agreements for Indemnity.—In the absence of any statutory provision therefor, a sheriff cannot recover from a defendant money which the sheriff has been compelled to pay the plaintiff for neglect to make the same on execution.³ But if he receives money on the sale of goods as the property of the execution debtor, and pays it over to the execution creditor, he may recover against the latter the amount so paid over, in case the rightful owner of the goods sold sues and recovers against him the value thereof. But he cannot, unless he have a bond of indemnity, or unless specially directed by such creditor to make the levy, recover his costs and expenses in defending against the rightful owner, nor anything save the exact amount of money paid to the execution creditor, and his costs in the action to recover such money.⁴ If he have an agreement of indemnity, he may, in such case, maintain an action thereon, although in making sale of the goods, or otherwise executing his process, he has not strictly complied with the requirements of the statute, unless it is expressly shown that such failure to comply was the ground of recovery of the judgment

¹ *Clearwater v. Brill*, 63 N. Y., 627; reversing S. C., 4 Hun, 728; *Earl v. Camp*, 16 Wend., 562; *Thatcher v. Maack*, 7 Ill. App. 635; *Gates v. Neimeyer*, 54 Iowa, 110; *Blau v. Loftus*, 48 Wis., 371.

² *Clearwater v. Brill*, *supra*.

³ *Bigelow v. Prevost*, 5 Hill, 566; *Walker v. Bradbury*, 57 Mo., 66; *Reed v. Pruyn*, 7 Johns., 426; *Voorhees v. Gros*, 3 How., 362; *Carpenter v. Stilwell*, 11 N. Y., 61.

⁴ *Crocker on Sheriffs* (2d ed.), 363, § 833.

against him in the claimant's action.¹ But a contract or promise to return the moneys paid over, in such case, cannot be implied in hostility to, and at variance with, an express contract to indemnify upon certain conditions not performed by the sheriff.² A just and fair agreement by a judgment debtor, to pay for the services of a keeper, in order to prevent the closing of his store, is valid, and may be enforced by the officer.³

3. *Upon Bonds of Indemnity, other than Bonds for Jail Liberties.*

When Right of Action Accrues.—A bond to an officer, conditioned to keep him harmless, and indemnified of, from, and against all damages, costs, charges, trouble and expense that he may be put to, sustain, or suffer by reason of a levy upon and sale of property on execution, is broken, and an action may be maintained upon it, so soon as a liability is incurred by the officer in consequence of such levy and sale. The obligee is not bound first to advance his own money, to discharge a liability, before he can seek indemnity by an action upon the bond.⁴ But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained.⁵ A recovery in such case, without payment of the judgment, or some part thereof, does not entitle the obligee to sustain an action against the indemnitors.⁶ In the first case the covenant is to save the officer harmless from the thing specified, and in the latter from the consequences of it.⁷ A sheriff may maintain an action upon a bond taken by his deputy in the name of the sheriff, conditioned to indemnify the latter, and all persons assisting him in the premises, with-

¹ *Crossman v. Owen*, 62 Me., 528; *Stanton v. McMullen*, 7 Ill. App., 326.

² *Preston v. Yates*, 24 Hun, 534.

³ *Murtagh v. Conner*, 15 Hun, 498.

⁴ *Bancroft v. Winspear*, 44 Barb., 209, overruling *Scott v. Tyler*, 14 id., 202; *Johnson v. Gilbert*, 9 Hun, 469; *Chace v. Hinman*, 8 Wend., 452; *Rockfeller v. Donnelly*, 8 Cow., 628.

⁵ *Gilbert v. Wiman*, 1 N. Y., 550.

⁶ *Gilbert v. Wiman*, *supra*.

⁷ See *Kohler v. Matlage*, 72 N. Y., 259; *Wright v. Whiting*, 40 Barb., 235.

out any assignment of the cause of action by the latter.¹ But an action cannot be maintained by the successor in office of a sheriff upon a bond given by a defendant in execution to the sheriff for the delivery to him, or his deputy, of property levied upon under the execution, and left with the defendant therein. Such a bond is a mere personal obligation for the indemnity of the sheriff, and not an official bond which passes to his successor in office.² Where a sheriff, upon making a levy, demands and receives a bond of indemnity containing a proviso that in case any suit should be brought against him, the judgment creditors should be notified and permitted to defend, and, being sued by a third party claiming the property levied upon, fails to notify the judgment creditors of the suit and give them an opportunity to defend it, he cannot maintain an action upon the undertaking.³

What Bonds Prohibited.—Taking indemnity by a public officer is not, necessarily, unlawful, because not expressly authorized by statute; a bond, valid at common law, is not avoided by the statute. The words “color of office,” as therein used, imply an illegal claim of right or authority to take the security.⁴ “Color of office” is defined as a pretense of official right to do an act made by one who has no such right.⁵ So where the bond of indemnity to a sheriff was conditioned to hold him harmless against any damages which might at any time arise, as well for levying under and by virtue of an execution described, as for entering any building or other premises to make such levy, it was held, in an action by the sheriff on the bond to recover indemnity for damages against him for entering a dwelling house to make a levy, *previous to the execution of the bond*, that the bond was not void, as the words “color of office” do not include such a case. It appeared that the entry in the dwelling house was made at the request, and by the advice of the obligor, and that, at the time of the execution of the bond, the sheriff had refused to proceed

¹ Stilwell v. Hurlbert, 18 N. Y., 374.

² Griffin v. Ingram, 8 S. C., 249.

³ Preston v. Yates, 24 Hun, 534.

⁴ Burrall v. Acker, 23 Wend., 606; Decker v. Judson, 16 N. Y., 439; Chamberlain v. Beller, 18 N. Y., 115.

⁵ 1 Bouv. Law Dict., 293; and see 9 East, 364.

further in removing the goods from the house until indemnified by the obligor. The sheriff did not claim to have the bond given under "color of office." He refused to proceed forward in a levy where he doubted his right to make a levy, unless he were indemnified for an act, not to be done, but already done. Although a bond indemnifying against an illegal act *to be* committed is void; one indemnifying against an illegal act, already done, and not known to be illegal at the time, is valid.¹ But if an unauthorized security is designedly taken to indemnify against an act *to be done*, as where a security containing conditions not embraced in the statutes, is taken from a person under arrest, as a ground of his discharge, it is void as having been taking, *colore officii*, although the officer may not have designed to violate the law.² If an undertaking, indemnifying against an act to be done, which the statute directs or permits to be demanded and taken, omits a provision which the statute prescribes, or contains a provision which the statute does not require, it is void if taken by color of office, or designedly, and no action can be maintained upon it.³ And in the absence of any evidence upon the subject it must be assumed that the officer designedly took the undertaking in the form in which it is found.⁴ Mere verbal variations, from statutory forms, however, will not make void the undertaking.⁵ What bonds the sheriff is directed or permit-

¹ Griffiths v. Hardenbergh, 41 N. Y., 464; Stone v. Hooker, 9 Cow., 154; Doty v. Wilson, 14 Johns., 379; Kneeland v. Rogers, 2 Hall, 579.

² Cook v. Freudenthal, 80 N. Y., 202; 3 R. S., tit. 2, chap. 3, art. 2, § 59; id. (5th ed.), 476, § 48; id. (6th ed.), 448, § 49; id. (7th ed.), 2374, § 59.

³ Cook v. Freudenthal, *supra*; Winter v. Kinney, 1 N. Y., 368; McKenzie v. Smith, 48 id., 143; Richardson v. Crandall, 48 id., 348; Barnard v. Viele, 21 Wend., 88; Strong v. Tompkins, 8 Johns., 98; Sullivan v. Alexander, 19 id., 233; Webber's Exrs. v. Blunt, 19 Wend., 188; Bank of Buffalo v. Boughton, 21 id. 57; People v. Meighan, 1 Hill, 298.

⁴ Cook v. Freudenthal, *supra*.

⁵ Code Civ. Pro., §§ 729, 730; Beaufage's Case, 10 Rep., 426. The provisions of the Code are as follows:

"A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit, it is given."

"Where such a bond or undertaking is defective, the court, officer, or body,

ted to take by statute are shown in their proper places in this work, as well as the manner and form in which they should be taken. Suffice it here, again to iterate, that any bond indemnifying an officer against a subsequent neglect of duty, or an illegal act, is void ; although a bond for an undesigned past omission of duty or illegal act already done, not knowing it to be illegal may be valid.¹ But if an officer voluntarily and knowingly does an illegal act, or omits a duty, a bond indemnifying against such act, or omission, thereafter taken, would be void. And where one has been suffered voluntarily to escape, a bond given by him for the limits, on being retaken, is void for duress.² A bond is void if it contain or omit provisions contrary to the directions of the statute, if it is taken designedly by the officer. But where the sheriff disclaims his right to take an unauthorized bond, and it is urged upon him by the obligors, and taken with the consent of the plaintiff, there is no oppression, or corrupt use, of official power, which will avoid the bond. As between plaintiff and defendant, or his surety, any kind of bond or agreement would suffice, if the same was good at common law.³ This rule, however, has no application to the case of a bond, or security, taken by the sheriff in the assumed exercise of his official authority.⁴

General Provisions as to Bonds.—Whenever any sheriff is required by law to assign any bond, taken by him in the progress of any cause or proceeding, to any party, and the office of such sheriff shall be vacant, his under sheriff, or the person acting in the place of such sheriff, is authorized and may be compelled to execute such assignment, in the name of the sheriff to whom such bond was given ; which

that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution."

¹ Winter v. Kinney, 1 N. Y., 365; Perkins v. Proud, 63 Barb., 420; Griffiths v. Hardenburgh, 41 N. Y., 464; Love v. Palmer, 7 Johns., 159.

² Bronson v. Noyes, 7 Wend., 188.

³ Adee v. Adee, 16 Hun, 46; Decker v. Judson, 16 N. Y., 442; Ring v. Gibbs, 26 Wend., 502; Morton v. Campbell, 37 Barb., 179; S. C., 14 Abb. Pr., 410, 415, 416; Shaw v. Tobias, 3 N. Y., 188.

⁴ Cook v. Freudenthal, 80 N. Y., 202.

assignment shall be as valid and effectual as if executed by said officer.¹

A bond or undertaking, given in an action or special proceeding, as prescribed in the Code of Civil Procedure, must be acknowledged or proved, and certified in like manner as a deed to be recorded.²

Where a provision of said Code requires a bond or undertaking, with sureties, to be given by, or in behalf of, a party or other person, he need not join with the sureties in the execution thereof, unless the provision requires him to execute the same; and the execution thereof by one surety is sufficient, although the word "sureties," is used, unless the provision expressly requires two or more sureties.³

A bond or undertaking, executed by a surety or sureties, as prescribed in said Code, must, where two or more persons execute it, be joint and several in form; and, except as otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect, that he is a resident of, and a householder or a freeholder within, the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities, which he owes or has incurred, and exclusive of property, exempt by law from levy and sale under an execution. A bond or undertaking given by a party, without a surety, must be accompanied by his affidavit, to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court, before which the proceeding is taken, or a judge thereof, or the judge, before whom the proceeding is taken. The approval must be indorsed upon the bond or undertaking.⁴

But where the penalty of the bond, or twice the sum specified in the undertaking, is \$20,000 or upwards, the court or judge may, in its or his discretion, allow the sum, in which a surety is required to justify, to be made up by the justification of two or more sureties, each in a smaller sum. But, in that case, a surety cannot justify in a sum

¹ 3 R. S. (5th ed.), 476, § 49; id. (6th ed.), 448, § 50; id. (7th ed.), 2374, § 60.

² Code Civ. Pro., § 810.

³ Code Civ. Pro., § 811.

⁴ Code Civ. Pro., § 812.

less than \$10,000 ; and, where two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum, for more than one of them.¹

Where a bond or undertaking has been given, as prescribed by law, in the course of an action or special proceeding, to the people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof ; the party or other person, so interested, may maintain an action in his own name, for a breach of the condition of the bond, or of the terms of the undertaking : upon procuring an order, granting him leave so to do. The order may be made by the court, in which the action is or was pending ; or by a superior city court, the marine court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court ; or, in any other case, by the Supreme Court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.²

A bond or undertaking, given in an action or special proceeding, as prescribed by the Code of Civil Procedure, continues in force, after the substitution of a new party in place of an original party, or any other change of parties ; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.³

A bond or undertaking, required to be given by this act, must be filed with the clerk of the court ; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in the Code of Civil Procedure.⁴

Evidence, and Damages Recoverable in Action Upon Bond.—In an action by a sheriff upon a bond, indemnifying him for a levy and sale under an execution, or for a seizure upon an attachment, where a recovery has been had against him by a third person claiming the property, the plaintiff is bound to show the amount of damages sustained by him by performing the acts against the consequences of which he was indemnified by the defendants. He may do

¹ Code Civ. Pro., § 813.

³ Code Civ. Pro., § 815.

² Code Civ. Pro., § 814.

⁴ Code Civ. Pro., § 819.

this by showing the recovery of the judgment against him and its payment, and the costs and expenses incurred in defending the action. The defendants may then prove, in mitigation of damages, under a general denial, the amount received by the sheriff on the sale of the property; it is then incumbent upon the sheriff to show that he has paid, or is liable to pay, any portion of the amount so received to another. *Prima facie*, the sheriff is entitled to recover all the costs and expenses he has been put to, in consequence of the acts indemnified against.¹ Where there is a surplus of property levied on, and not sold by the sheriff, upon payment of a judgment against him in favor of the owner for making the levy, in which the value of the property is recovered, the property becomes vested in the sheriff, and the obligors in the bond of indemnity to the sheriff, when the latter brings suit thereon, may offset the value of such surplus property, or, after payment of judgment against them on the bond, if the offset is not claimed in the action, they will be entitled to a proportionate share of such property, or to an account of the proceeds.²

Where the agreement is to indemnify the sheriff against all harm, etc., "that may arise at any time, as well for levying and making sale, under and by virtue of such execution," etc., the fact that the levy was made before the bond was given, does not affect the sheriff's right to recover, if he pays a judgment recovered against him for the goods by the owner thereof.³ And where the condition is to keep the sheriff harmless, and pay all damages in case the execution be levied on wrong property, *and the same sold*, the obligors are bound to indemnify him, although the property be replevied from him, by the owner, before a sale had been made.⁴ The bond of indemnity imputes to the obligor of the bond the entire responsibility which vested at common law, upon the sheriff, for an illegal levy upon personal property.⁵ Where such bond is given, the sheriff may recover

¹ O'Brien v. McCann, 58 N. Y., 373; Secrets v. Markwell, 11 Bush. (Ky.), 316.

² Alston v. Conger, 66 Barb., 272.

³ Alston v. Conger, *supra*.

⁴ Finckle v. Evers, 25 Ohio St., 82.

⁵ Shattuck v. Miller, 50 Miss., 386.

all his costs and expenses incident to a successful defense of an action brought against him for the seizure and sale of the property, even though other creditors were benefited by a surplus remaining after the payment of the indemnitor's claim.¹

Against Bail upon an Arrest, in a Civil Action, who do not Justify.—The bail taken upon an arrest in a civil action, unless they justify, or other bail are given and justify, are liable to the sheriff for all damages which he sustains by reason of the omission.² But sureties who fail to justify, after notice that the plaintiff does not accept the bail, are not liable as bail to the sheriff. The cause of action given to the sheriff is not upon the undertaking, but for the damages sustained by him as bail, by reason of their omission to justify. In order to recover, the sheriff must have actually sustained damages. The mere omission to justify does not entitle him to recover.³ The sheriff, on a failure of the sureties to justify, can only exonerate himself by re-arresting the defendant, and holding him in actual custody. He cannot surrender him to the coroner; and any undertaking taken by the coroner on releasing him, after such surrender, is void.⁴

Against Rescuers.—A rescue in execution is no defense to the sheriff in an action for an escape.⁵ And the sheriff can maintain an action against the rescuers for his damages sustained by reason of the rescue. In such action the officer's return of a rescue is conclusive evidence of such fact.⁶ In such action, however, it is not necessary to show that the sheriff had returned the writ and the rescue.⁷

Against Deputies, and upon Deputy's Bond.—Whenever the sheriff is damnified by the act or neglect of his undersheriff, deputy or other officer, he may maintain an action against the one causing the damage therefor. If, as is ordinarily the case, the sheriff has taken a valid bond from

¹ Chamberlain v. Beller, 18 N. Y., 45.

² Code Civ. Pro., § 589.

³ Clapp v. Schutt, 44 N. Y., 104; aff'g S. C., 44 Barb., 9; 19 Abb. Pr., 121; 29 How. Pr., 255.

⁴ Douglass v. Warren, 19 Hun, 3.

⁵ Cargill v. Taylor, 10 Mass., 206.

⁶ Buckminster v. Applebee, 8 N. H., 546.

⁷ Worthington v. Filthy, 3 Harr. & McHen. (Md.), 91.

his officer, with sureties conditioned to save him harmless, etc., he may maintain an action upon the bond whenever the condition thereof is broken. In such action it should be averred that there has been a breach of the deputy's official duty, in consequence of which a recovery has been had against the sheriff.¹ And it is no defense that the sheriff neglected to defend the suit against him, by which he was damnified within the terms of the bond.² But if the bond is conditioned, that the sheriff shall not sustain any damage or molestation by reason of any act done or liability incurred by or through such deputy, it will not be sufficient, in an action thereon, to aver merely that a recovery has been had against the sheriff. Actual payment of the judgment or a part thereof, must be averred and proved.³ The distinction is made between indemnity against an act or a neglect, and indemnity against the *consequences* of an act or a neglect. Where the sheriff takes from his deputy a bond, conditioned for the faithful performance of his duties, and also for the payment over to the sheriff of one half of his fees, the bond is valid; and upon a retention of more than one half of his fees by the deputy, the sheriff may maintain an action upon the bond.⁴

Where the fault of the deputy in not making an arrest is remedied by a subsequent surrender, and the damages sustained by the sheriff, have been occasioned by his discharging the debtor after the surrender, the sheriff cannot fall back on the original fault of the deputy, for the purpose of rendering him and his sureties liable for those damages.⁵

A bond by a deputy, conditioned to indemnify the sheriff from *all costs, damages, expenses and trouble*, touching and concerning the return and execution of process, and concerning the not executing, or wrongful execution of process, will not be so construed, as to render the obligors liable for the costs and expenses of suits *wrongfully* instituted against the sheriff, and wherein he recovered.⁶ The con-

¹ *Hide v. Childs*, 1 Chip. (Vt.), 230.

² *Andrus v. Bealls*, 9 Cow., 693.

³ *Gilbert v. Wiman*, 1 N. Y., 550.

⁴ *Mott v. Robbins*, 1 Hill, 21.

⁵ *Walter v. Middleton*, 68 N. Y., 605.

⁶ *Franklin v. Hunt*, 2 Hill, 671; *Rowe v. Richardson*, 5 Barb., 385.

dition of such a bond is not broken, unless an improper act or omission on the part of the deputy is shown. But it is a breach of a deputy's bond, indemnifying the sheriff against an improper act or omission, if the deputy fails to pay over money collected by him on execution, even if the sheriff should never be sued or made to pay the amount.¹ So, if the sheriff hold a senior execution, and the deputy collecting money on a junior execution, refuse to apply it on the senior, the condition of the bond is broken.² In all cases where the sheriff himself is liable for an act or a neglect of his deputy, he may maintain an action upon the deputy's bond, against the deputy and his sureties, for the damages suffered or incurred, according as the condition of the bond appears. If the indemnity is for the act or omission, the sheriff may sue on the bond when the liability is incurred. Otherwise he cannot maintain an action until the damages are, by him, actually suffered.

It is a good defense in an action upon a deputy's bond, that the act or omission declared upon as breach of the bond was caused not in the line of the deputy's official duty, but by the special directions of the sheriff, excluding all discretion, in the particular instance, on the part of the deputy. The communication of mere information and advice, however, will not have that effect.³ But in an action upon the bond, because of the deputy's neglect to pay over money received by him as deputy, it is no defense that the deputy kept the money by the sheriff's leave, unless there was a valid discharge, under seal.⁴ Nor, in such case, is it a defense, that the default occurred after the deputy had become insolvent, and the surety had requested the sheriff to remove him from office.⁵

4. *Upon Bonds for Jail Liberties.*

Jail Liberties.—The following are the liberties of the jail for each of the counties specified, to wit:

For the city and county of New York, the whole of that city and county.

¹ Willett v. Stewart, 43 Barb., 98.

² Rowe v. Richardson, 5 Barb., 385.

³ Tuttle v. Cook, 15 Wend., 274.

⁴ Hart v. Brady, 1 Sandf., 626.

⁵ Andrus v. Bealls, 9 Cow., 693; Barnard v. Darling, 11 Wend., 28.

For the county of Onondaga, the whole of the city of Syracuse.

For the county of Monroe, the whole of the city of Rochester.

For the county of Erie, the whole of the city of Buffalo.

For the county of Dutchess, the whole of the city of Poughkeepsie.

For the county of Kings, the whole of that county.

For the county of Albany, the whole of the city of Albany.

For the county of Jefferson, the whole of the city of Watertown.

For the county of Herkimer, the whole of the village of Herkimer.

For the county of Rensselaer, the whole of the city of Troy.¹

For the county of Ulster, the whole of the city of Kingston.²

The liberties of the jail, in each of the other counties of the State, as heretofore established, shall continue to be the liberties thereof, until they are altered, or new liberties are established, as prescribed by law.³

Where the liberties of a jail are altered or established, by resolution of the board of supervisors, as prescribed by law, a space of ground, adjacent to the jail, and not exceeding five hundred acres in quantity, must be laid out as the jail liberties, in a square or rectangle as nearly as may be; but a stream of water, canal, street, or highway, may be adopted as an exterior line, notwithstanding it is not in a straight line, or is not at right angles with the other exterior lines of the liberties. A resolution establishing or altering jail liberties, must contain a particular description of their boundaries; and as soon as may be after its adoption, the boundaries must be designated by monuments, inclosures, posts,

¹ Code Civ. Pro., § 145.

² Laws of 1881, chap. 299; 3 R. S. (7th ed.), 2392.

³ Code Civ. Pro., § 146. By the act of 1873, chapter 482, § 18, the boards of supervisors of the respective counties, each for its own county, has power to establish, on the recommendation of the county court, and to alter, from time to time, as such court shall recommend, the liberties of the county jail, or jails, for the purposes defined by statute. See 2 R. S. (7th ed.), 946, § 18.

or other visible and permanent marks, at the expense of the county.¹

The county clerk must, within one week after a resolution of the board of supervisors, establishing or altering jail liberties, has been filed in his office, deliver an exemplified copy thereof to the keeper of the jail; who must keep the same exposed to public view, in an open and public part of the jail, and exhibit it to each person admitted to the liberties of the jail, at the time of his executing a bond for that purpose.²

Who entitled to Jail Liberties.—A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail, upon executing a bond to the sheriff, as prescribed in section 150 of the Code of Civil Procedure.³

Whenever execution shall be issued upon judgments recovered in actions for penalties for trespass on any lands belonging to the people of the State, or any Indian lands, and the body of any defendant shall be arrested thereon, he shall be imprisoned according to law, without being entitled to the liberties of the jail.⁴

Whenever a judgment shall be obtained before a justice of the peace against any person for any penalty or forfeiture under Laws of 1859, chapter 346 (relative to salt springs), and an execution be issued thereon, in case the officer having such execution shall not be able to levy the same on any property of the defendant, he shall commit the defendant to the jail of the county, where he shall remain confined within the walls of the jail, without bail, for the term of sixty days, unless he shall sooner pay or satisfy such execution; and every execution so issued shall contain a clause ordering the defendant to be imprisoned, as above specified, unless property whereon to levy such execution shall be found by the officer to whom the same shall be directed.⁵

¹ Code Civ. Pro., § 147.

² Code Civ. Pro., § 148.

³ Code Civ. Pro., § 149.

⁴ 1 R. S. (5th ed.), 544, § 94; id. (6th ed.), 604, § 94; id. (7th ed.), 575, § 76; Laws of 1826; chap. 209, § 3; see Code Civ. Pro., § 157.

⁵ Laws of 1859, chap. 346, § 134; 1 R. S. (5th ed.), 681, § 244; id. (6th ed.), 732, § 134; id. (7th ed.), 732, § 134; see Code Civ. Pro., § 157.

Whenever a judgment shall be recovered in a court of record for any penalty or forfeiture incurred under said act, and an execution thereon against property shall have been returned unsatisfied, in whole or in part, the defendant upon any execution against his body, shall be imprisoned within the walls of the county jail, in the manner above provided, one day for each dollar in the penalty recovered in such cause, and then remaining unpaid, without bail, unless he shall sooner satisfy such execution.¹ If, at any time, any defendant so committed to jail shall be found without the walls of the jail before he is entitled to his discharge, it shall be deemed an escape, and the sheriff shall be liable for the amount due on the execution.²

Under a warrant for the collection of fines and penalties under the Military Code, the body of delinquents, when taken, must be closely confined.³

Any prisoner committed to jail upon process, for contempt, is not entitled to the jail liberties.⁴

No prisoner committed to jail on criminal process, is entitled to the liberties.⁵

In any judgment rendered or recovered on any bond to be given under and pursuant to the Excise Laws, or for any penalty incurred under said laws, the person or persons against whom such judgment shall be rendered shall not be entitled, under any execution issued on such judgment, to the liberties of the jail.⁶ In an action brought in one of the district courts in New York city, by a female, for services performed by her, when execution is issued against the person of the defendant, the latter must be actually confined in the jail, and is not entitled to the liberties thereof; but he must be discharged, after having been so confined fifteen days.⁷

Bond for the Limits.—The liberties having been ap-

¹ Same as preceding references to R. S., next section; Code Civ. Pro., § 157.

² Same as preceding references to R. S., next section; Code Civ. Pro., § 157.

³ See *ante*, sub. 4, § 3 of chap. 5; Military Code, § 214; as amended by Laws of 1880; chap. 547; 1 R. S. (7th ed.), 779, § 214.

⁴ Code Civ. Pro., § 157.

⁵ Code Civ. Pro., § 3347, subd. 1.

⁶ Laws of 1856, chap. 628, § 32; 2 R. S. (5th ed.), 946, § 33; 2 id. (6th ed.), 941, § 40; 3 id. (7th ed.), 1985, § 32.

⁷ Code Civ. Pro., § 3221.

pointed, it is the sheriff's duty to take the bond therefor; but it is not his duty—it is the prisoner's—to ascertain the lines, and that the same are observed.¹

The bond must be executed by the prisoner, and one or more sufficient sureties, residents, and householders or freeholders of the county, in a penalty at least twice the sum, in which the sheriff was required to hold the defendant to bail, if he is in custody under an order of arrest, or has been surrendered in exoneration of his bail, before judgment; or directed to be collected by the execution, if he is in custody under an execution; or remaining uncollected upon a judgment against him, if he has been surrendered after judgment; conditioned, that the person so in custody shall remain a prisoner, and shall not, at any time, or in any manner, escape or go without the liberties of the jail, until discharged by due course of law.²

Bond, Indemnity to Whom.—A bond so taken is held for the indemnity of the sheriff taking it, and of the party at whose instance the prisoner executing it is confined.³

When Security Insufficient.—If a sheriff, who has taken such a bond, discovers that a surety therein is insufficient, he may commit the prisoner who executed it to close confinement in the jail, until another bond, with good and sufficient sureties, is offered.⁴

When Sureties May Surrender Principal.—One or more of the sureties, in a bond given for the liberties of a jail, may surrender the principal, at any time before judgment is rendered against them in an action on the bond; but they are not exonerated thereby, from a liability incurred before making the surrender.⁵

Surrender, How Made.—The surrender must be made as follows: The surety or sureties making it must take the principal to the keeper of the jail, who must, upon his or their written requisition to that effect, take the principal into his custody, and indorse upon the bond given for the liberties, an acknowledgment of the surrender; and also, if required, give the surety or sureties a certificate, acknowledging the surrender.⁶

¹ Kip v. Brigham, 7 Johns., 168.

⁴ Code Civ. Pro., § 152.

² Code Civ. Pro., § 150.

⁵ Code Civ. Pro., § 153.

³ Code Civ. Pro., § 151.

⁶ Code Civ. Pro., § 154.

What not an Escape.—The going at large, within the liberties of the jail in which he is in custody, of a prisoner who has executed such a bond, or of a prisoner who would be entitled to the liberties upon executing such a bond, is not an escape. But the going at large, beyond the liberties, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape; and the sheriff in whose custody he was, has the same authority to pursue and retake him, as if he had escaped from the jail. Such an escape forfeits the bond for the liberties, if any; subject to the provisions of article five of title two of chapter two of the Code of Civil Procedure.¹

What are Defenses in an Action upon the Bond.—In an action brought by a sheriff on a bond for the jail liberties, it is a defense, that the prisoner voluntarily returned to the liberties of the jail from which he escaped, or was recaptured by, or surrendered to the sheriff, from whose custody he escaped, before the commencement of the action. The defendants may make that or any other defense to the action, which might be made by the sheriff, to an action against him for the escape.² It is also a defense in such action that a deputy sheriff, who was also jailer, permitted the prisoner to leave the liberties.³

When, in Action on Bond, Judgment Against Sheriff Conclusive Evidence.—But if judgment has been rendered against the sheriff, in an action brought for the escape, and due notice of the pendency of the action was given to the prisoner and his sureties, to enable them to defend the same, the judgment against the sheriff is conclusive evidence of his right to recover against the prisoner and his sureties, to whom the notice was given, as to any matter which was or might have been controverted, in the action against the sheriff.⁴

In an action brought by a sheriff on a bond for the jail liberties, if it appears to the court, upon a motion made in behalf of the sheriff, that judgment has been rendered against him for the escape of the prisoner, and that due

¹ Code Civ. Pro., § 155; see *post*, next provisions in text.

² Code Civ. Pro., § 160.

³ *Wemple v. Glavin*, 5 Abb. N. C., 360; S. C., 57 How. Pr., 109.

⁴ Code Civ. Pro., § 161.

notice of the pendency of the action against him, was given to the prisoner and his sureties, to enable them to defend the same, the court must order a summary judgment for the plaintiff, and judgment must be entered accordingly, with costs.¹

But to entitle a sheriff to move for such a judgment, he must have served a copy of his complaint, and given twenty day's notice of the motion.²

If it appears, on the hearing of the motion, that the defendants have a meritorious defense, which was not controverted in the action against the sheriff, and which by law could not have been so controverted, the court may stay proceedings on the judgment, with such limitations and upon such terms, as it deems just, until a trial in the action; but the judgment must stand as a security for the sheriff. If the defense is established, the court must vacate the judgment, and render judgment for the defendant.³

What Damages Recoverable.—In an action brought by a sheriff on a bond for the jail liberties, a judgment against him for the escape of the prisoner, is evidence of the damages sustained by him, as if it had been collected; and he may recover his reasonable attorney's and counsel fees, and other expenses in defending the action against him, as part of his damages.⁴

When Bond to be Assigned.—If a bond for the jail liberties is forfeited, the party at whose instance the prisoner was confined, or, in case of his death, his executor or administrator is entitled to an assignment thereof; which must be executed by the sheriff who took the bond, or, in case of a vacancy in his office, by his under-sheriff, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county.⁵

The person to whom such an assignment has been made, may maintain an action on the bond, as assignee of the sheriff taking the same, in a case where an action might be maintained by the sheriff; and he may recover the same damages for the breach of the condition, which he might

¹ Code Civ. Pro., § 162.

⁴ Code Civ. Pro., § 165.

² Code Civ. Pro., § 163.

⁵ Code Civ. Pro., § 166.

³ Code Civ. Pro., § 164.

have recovered in an action against the sheriff, for the escape.¹

The acceptance of an assignment of such a bond, is a bar to an action, by or in behalf of the assignee, against the sheriff or other officer making the same, for an escape by the prisoner executing the bond, amounting to a breach of the condition thereof, unless the escape was with the assent of the sheriff or other officer.²

In an action brought by the assignee of the bond the defendant may make any defense, which he might make, if the action was brought in the name and for the benefit of the sheriff.³

When Proceedings Upon Judgment Against Sheriff Stayed.—If the person entitled to an assignment of a bond for the jail liberties, in lieu of taking the same, brings an action against the sheriff for the escape, the court may, except where the escape was made with the sheriff's assent, stay proceedings upon a judgment recovered against the sheriff, with such limitations and upon such terms as it deems just, until he has had a reasonable time to prosecute the bond, and collect a judgment recovered thereon.⁴

In an action against a sheriff, or other officer, for the escape of a prisoner, it is a defense, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return, or by recapture.⁵

When Bond Not Taken.—Where a prisoner escapes without the assent of the sheriff, he may recover against him the damages he has sustained in consequence thereof, whether he has taken a bond from such a prisoner for the liberties of the jail or not; or the sheriff may retake the prisoner and detain him until he satisfies him for the damages he has sustained by reason of the escape.⁶ For a prisoner confined on civil and criminal process both, the sheriff cannot take a bond.⁷

¹ Code Civ. Pro., § 167.

² Code Civ. Pro., § 168.

³ Code Civ. Pro., § 169.

⁴ Code Civ. Pro., § 170.

⁵ Code Civ. Pro., § 171.

⁶ Crocker on Sheriffs, 364, § 834, citing Sewall, 451.

⁷ Bradford v. Consaulus, 3 Cow., 128.

A prisoner, committed to jail upon process for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail, until he is discharged by due course of law, or is removed to another jail, or place of confinement, in a case prescribed by law. A sheriff, or keeper of a jail, who suffers such a prisoner to go, or be at large, out of his jail; except by virtue of a writ of *habeas corpus*, or by the special direction of the court committing him, or in a case specially prescribed by law, is liable to the party aggrieved, for his damages sustained thereby, and is guilty of a misdemeanor. If the commitment was for the non-payment of a sum of money, the amount thereof, with interest, is the measure of damages.¹ But if the process of commitment does not show that the prisoner was convicted of a contempt, and that the sum he was ordered to pay was a fine, the sheriff cannot be punished for allowing him the liberties.²

When Sheriff Cannot Recover in Action on Bond for Jail Liberties.—If the creditor give his debtor, in execution, permission to go at large, beyond the jail liberties, the judgment is absolutely discharged.³ And this is so, even where the debtor agrees, in consideration of such permission, that he will still be bound by the judgment, and that the plaintiff may rearrest him on another execution in case he does not pay the judgment.⁴ This rule has been maintained, inflexibly, by an unbroken current of authority, from a very early period to the present time.⁵ All the cases go upon the ground that the debt is satisfied by the arrest of the person; and the judgment is of no further validity or force, if the plaintiff has consented to the discharge from arrest. If the discharge is by act of law, it is otherwise. If the creditor consent that one of the joint debtors charged in execution may go beyond the jail liberties, the judgment is, by his consent, discharged as against all.⁶ If the sheriff,

¹ Code Civ. Pro., § 157.

² *People v. Bennett*, 4 Paige, 282.

³ *Powers v. Wilson*, 7 Cow., 274; *Lathrop v. Briggs*, 8 id., 171; *Poucher v. Holley*, 3 Wend., 184; *Kasson v. People ex rel. Rease*, 44 Barb., 347.

⁴ *Yates v. Van Rensselaer*, 5 Johns., 364; *Blackburn v. Stupart*, 2 East, 243; *Jaques v. Withy*, 1 T. R., 557.

⁵ *Bonesteel v. Garlinghouse*, 60 Barb., 333, 344.

⁶ *Ransom v. Keyes*, 9 Cow., 128.

in case the judgment is so discharged and extinguished, is sued for an escape, he must plead such defense. If he waives it he acts at his peril, and cannot recover against the sureties upon the limit bond.¹ And where the prisoner obtained a discharge as an insolvent, and on presenting it to the sheriff, was discharged from imprisonment by him, it was held that the sheriff could not maintain an action upon the limit bond.²

The recital of an execution in a bond for the jail liberties is sufficient proof of it, in an action on the bond.³

SECTION II.

ESCAPES ; AND ACTIONS THEREFOR.

1. *What is an Escape.*

Voluntary and Negligent Escape, Distinction Between.

—The going at large beyond the liberties, by a prisoner, who might be entitled to the liberties, without the assent of the party at whose instance he is in custody ; or the special direction of the court, or, a deliverance, however temporary, from close confinement, of a prisoner, not entitled to the liberties, without the assent of the party at whose instance he is in custody, or the special direction of the court, is an escape.⁴

A *voluntary* escape takes place when the prisoner has given to him, by his keeper, any liberty not authorized by law. A *negligent* escape takes place when the prisoner goes at large unlawfully, either because the building or prison, in which he is confined, is too weak to hold him, or because the keeper by carelessness lets him go out of prison.⁵ “Between a voluntary and a negligent escape there is a striking difference as regards the rights of the sheriff. His liabilities to the plaintiff are the same in both cases. There is, however, a difference as to the remedy. In case

¹ Ransom v. Keyes, *supra*

² Hayden v. Palmer, 2 Hill, 205; *aff'd* S. C., 7 id., 385.

³ Ransom v. Keyes, *supra*.

⁴ Code Civ. Pro., §§ 155, 156, 157; State v. Davis, 14 Nev., 439.

⁵ 1 Bouv. Law Dic., 537, tit. Escape.

of a negligent escape, if the prisoner return before suit brought, the escape is purged and he is, of course, a prisoner again at the suit of the plaintiff. But in case of a voluntary escape, although the prisoner return before suit brought, the escape is not, *ipso facto*, purged as in case of a negligent escape; but the plaintiff may prosecute for it. He may, however, affirm him in prison at his suit, but such affirmation will not be presumed. It requires some positive act; either new process, or notice that the prisoner is received again as a prisoner at the plaintiff's suit. The sheriff's rights, however, in relation to the prisoner, are very different. In case of a negligent escape, the sheriff may pursue and retake the prisoner; in case of a voluntary escape, he cannot without authority from the plaintiff: yet, it seems, in case of a voluntary return of the prisoner, the sheriff may receive him into custody, but cannot detain him without the authority or assent of the plaintiff. These principles, if I mistake not, are found established by the decisions of this court." ¹ After a voluntary escape, a bond taken for the jail liberties from the prisoner, though he voluntarily returns, would be void for duress.² The distinction between voluntary and negligent escapes does not apply to criminal cases. "The public ought not to be deprived of any right by an escape of whatever kind from custody *under criminal process*. Though the officer consent to the escape, he is bound to retake the prisoner."³ So, if the escape be negligent, or if the prisoner were in custody under civil process, the officer may immediately pursue and retake him wherever he may be found within the State;⁴ and to retake him, the officer, "after notice of his intention and refusal of admittance, may break open an outer or inner door or window of a building."⁵ And if the prisoner

¹ Per Savage, Ch. J., in *Littlefield v. Brown*, 1 Wend., 398, 402; citing *Lansing v. Fleet*, 2 Johns. Cas., 3; *Thompson v. Lockwood*, 15 Johns., 256; and see *Wesson v. Chamberlain*, 3 N. Y., 331; *Brown v. Littlefield*, 7 Wend., 454; *aff'd*, 11 id., 467; *Code Civ. Pro.*, § 171; *id.*, § 155; *Riley v. Whittaker*, 49 N. H., 145; *Sanderson v. Rutland*, 43 Vt., 385.

² *Thompson v. Lockwood*, 15 Johns., 256.

³ Per Cowen J., in *Clark v. Cleveland*, 6 Hill, 344; and see *Arnold v. Stevens*, 10 Wend., 515; *Gano v. Hall*, 42 N. Y. 67,

⁴ *Code Crim. Pro.*, § 186.

⁵ *Code Crim. Pro.*, § 187.

were in custody under sentence of imprisonment for any crime, on recapture, he may be imprisoned for a term equal to that portion of his original term of imprisonment which remained unexpired upon the day of his escape.¹ Wherever an escape is shown, the law implies negligence on the part of the sheriff into whose custody the prisoner has been placed; and he can excuse himself only by showing that the escape was caused by the act of God, or other irresistible adverse force. The insecurity of the jail constitutes no defense. The sheriff is bound to have sufficient force to prevent a breach.² It, therefore, becomes necessary to inquire what are the duties of the sheriff or jailer with reference to the confinement of prisoners in his charge, and first, of

2. *Imprisonment in Civil Actions.*

Prisoner, how kept (see *ante*, pp. 35, 166).—A prisoner, arrested in a civil cause, must not be kept in a room in which any prisoner, detained on a criminal charge or conviction, is confined.³ Male and female prisoners must not be put in the same room; except that a husband and his wife may be put or kept together, in a room wherein there are no other prisoners.⁴

Jail Physician.—The board of supervisors of each county, except New York, must appoint some reputable physician, duly authorized to practice medicine, as the physician to the jail of the county. If there is more than one jail they must appoint a physician to each. The common council of the city of New York must appoint a similar physician, to the jail of that city and county. The physician to a jail holds his office at the pleasure of the board which appointed him, except in the county of Kings. In that county, the term of his office is three years.⁵

Sick Prisoners.—If the physician to a jail, or, in case of a vacancy, a physician acting as such, and the warden or jailer, certify in writing, that a prisoner, confined in the

¹ Penal Code, § 84.

² *Shattuck v. State*, 51 Miss., 575; *Kepler v. Barker*, 13 Ohio, 177.

³ Code Civ. Pro., § 123.

⁴ Code Civ. Pro., § 124.

⁵ Code Civ. Pro., § 126.

jail in a civil cause, is in such a state of bodily health, that his life will be endangered, unless he is removed to a hospital for treatment, the county judge, or, in the city and county of New York, one of the judges of the court of common pleas, must, upon application, make an order directing the removal of the prisoner to a hospital within the county, designated by the judge; or, if there is none, to such nearest hospital as the judge directs; that the prisoner be kept in the custody of the chief officer of the hospital, until he has sufficiently recovered from his illness, to be safely returned to the jail; that the chief officer of the hospital then notify the warden or jailer, and that the latter thereupon resume custody of the prisoner. If the prisoner actually escapes while going to, remaining at, or returning from the hospital, a new execution may be issued against his person, if he was in custody by virtue of an execution; or, if he was in custody by virtue of an order of arrest, a new order of arrest may be granted, upon proof by affidavit of the facts specified in the Code of Civil Procedure, section 127, without other proof and without an undertaking.¹

Prisoner Under United States Process.—A sheriff must receive into his jail and keep a prisoner, committed to the same, by virtue of civil process issued by a court of record, instituted under the authority of the United States, until he is discharged by the due course of the laws of the United States, in the same manner as if he was committed by virtue of a mandate in a civil action, issued from a court of the State. The sheriff may receive, to his own use, the money payable by the United State for the use of the jail.²

“A sheriff or jailer, to whose jail a prisoner is committed, as prescribed in the last section, is answerable for his safe keeping, in the courts of the United States, according to the laws thereof.”³

Discharge of Lunatic Prisoner.—If any person in confinement, under indictment or under sentence of imprisonment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or in consequence of any summary conviction, or

¹ Code Civ. Pro., § 127.

³ Code Civ. Pro., § 136.

² Code Civ. Pro., § 133.

by order of any justice, or under any other than civil process, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, call two respectable physicians and other credible witnesses, invite the district attorney to aid in the examination (and if he deem it necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors), and if it be satisfactorily proven that he is insane, said judge may discharge him from imprisonment, and order his safe custody and removal to a State asylum, where he shall remain until restored to his right mind; and then the superintendent shall inform the said judge and district attorney, so that the person so confined may, within sixty days thereafter, be remanded to prison, and criminal proceedings resumed or be otherwise discharged. When such person is sent to an asylum, the county from which he is sent shall defray all his expenses while there, and of sending him back if returned, but the county may recover the amount so paid from his own estate, if he have any, or from any relative, town, city or county, that would have been bound to provide for and maintain him elsewhere.¹

If a person, imprisoned on attachment or any civil process, or for the non-payment of a militia fine, becomes insane, one of the judges above mentioned shall institute like proceedings in his case as are required in the above named case; but notice shall be given by mail or otherwise, to the plaintiff or his attorney, if in the State; and if it shall be proved to the satisfaction of said judge, that the prisoner is insane, he may discharge him from imprisonment, and order him into safe custody and to be sent to a State asylum. The expenses of such person shall be defrayed as in the case above mentioned.²

Prisoner, not Entitled to Jail Liberties; how Kept.—If an officer has an execution, or other process, against the body of a defendant, in which he is commanded to commit said defendant to jail, and there him to keep without admitting him to the jail liberties, he must commit him within

¹ 2 R. S. (5th ed.), 893, § 49; id. (6th ed.), 846, § 26; 3 id. (7th ed.), 1906, § 26.

² 2 R. S. (5th ed.), 894, § 50; id. (6th ed.), 847, § 27; 3 id. (7th ed.), 1906, § 27.

a reasonable time and without unreasonable indulgence.¹ Except in extreme emergencies, such as sickness, fire, etc., there is no discretion left with the jailer. "He is not to consult his own or his prisoner's convenience, and board him in the jail or in his own private family out of the jail as is most convenient. There are certain rooms in jail buildings which are known and recognized as the jail, in which criminals and persons committed to jail are confined, and these are just as distinct from the other rooms that are occupied by the jailer's family, where he lives under the same roof which covers the jail proper, as though they were in different houses and under separate roofs. If the jailer may take a prisoner out of the jail proper, and have him out with his own family in their rooms, where he is not deprived of his liberty, nor confined within the proper wall, doors and bolts of the prison, he may take him to his dwelling-house a mile distant, or anywhere in the county and board him there, or, if he can let his prisoner go out of doors, and out of the jail to witness the sports of others, he can let him go out to engage in the same sports, or work on the farm, or visit from house to house as he may choose."² Every liberty given to a prisoner, not authorized by law, is an escape. By making a prisoner jail keeper, and giving him the key, a sheriff suffers an escape;³ or by permitting the prisoner to come into apartments not recognized as the jail proper, as where the jailer's family reside, or by permitting him to step outside the jail, an escape is suffered.⁴

Imprisonment on Justice's Court Executions Against the Body.—The keeper of the jail must keep a judgment debtor, arrested upon execution out of justice's court, in custody, in all respects as if the execution was issued out of the Supreme Court, until the judgment and the fees of the

¹ Langdon v. Hathaway, 1 N. H., 369; Olmstead v. Raymond, 6 Johns., 62; Palmer v. Hatch, 9 id., 329; Kellogg v. Gilbert, 10 id., 220; Wool v. Turner, 10 id., 420; Wheeler v. Bailey, 13 id., 366.

² Riley v. Whittiker, 49 N. H., 145; S. C., 6 Amer. Rep., 474, per Sargent, J.

³ Colby v. Sampson, 5 Mass., 310; Stevens v. Webb, 2 Vt., 344; Sherburn v. Beattie, 16 N. H., 437, and cases cited; Bolton v. Cummings, 25 Conn., 410, 423.

⁴ Clap v. Cofray, 10 Mass., 373; Bartlett v. Willis, 3 Mass., 86; Freeman v. Davis, 7 id., 200; Burroughs v. Lowder, 8 id., 373; McLellan v. Dalton, 10 id., 190; Riley v. Whittiker, 49 N. H., 145; S. C., 6 Amer. Rep., 474.

constable are paid ; or until the judgment debtor is thence discharged, in due course of law ; except that if the execution has an indorsement showing that the judgment was rendered in an action for a penalty or forfeiture, given by a statute of the State, the sheriff shall not admit the judgment debtor to the liberties of the jail.¹ If the person so committed to jail has a family within the State for which he provides, he must be discharged after remaining in custody, either with or without being admitted to the jail liberties, thirty days ; otherwise, he must be discharged after so remaining sixty days.²

Discharge, how Procured.—In order to procure a discharge, the prisoner must make, and deliver to the sheriff, or jailer, an affidavit, stating the facts which entitle him thereto, according to section 3033 of the Code. Upon receiving such an affidavit such officer must forthwith discharge the prisoner from his custody. He must thereupon deliver the affidavit to the clerk of the county, who must file it in his office, without fee.³ A sheriff, or jailer, who refuses to discharge the prisoner on receiving such an affidavit, forfeits twenty-five dollars for each day during which he detained the prisoner ; to be recovered by the latter in addition to any damages which he sustains by reason of the false imprisonment.⁴ The receipt of such an affidavit is a defense to an action brought against the sheriff, or jailer, by reason of the prisoner's discharge.⁵ And notwithstanding such discharge the judgment remains valid as against the debtor's property ; and a new execution may be issued accordingly, as if he had not been imprisoned.⁶

Prisoner Brought Before Court.—Where a person, who has been indicted for a criminal offense, is held by a sheriff, by virtue of a mandate in a civil action, or special proceeding, the court, in which the indictment is pending, may make an order, requiring the sheriff to bring him before the court ; whereupon the court may make such disposition of the prisoner, as to it seems proper. The sheriff must obey

¹ Code Civ. Pro., § 3032.

² Code Civ. Pro., § 3033.

³ Code Civ. Pro., § 3034.

⁴ Code Civ. Pro., § 3035.

⁵ Code Civ. Pro., § 3036.

⁶ Code Civ. Pro., § 3037.

such an order.¹ His fees and expenses, in so doing, are a county charge of the county wherein the court is sitting.

3. *Sheriff's Liability for an Escape.*

A prisoner, committed to jail upon process for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail, until he is discharged by due course of law, or is removed to another jail, or place of confinement, in a case prescribed by law. A sheriff, or keeper of a jail, who suffers such a prisoner to go, or be at large out of his jail; except by virtue of a writ of *habeas corpus*, or by the special direction of the court committing him, or in a case specially prescribed by law; is liable to the party aggrieved, for his damages sustained thereby, and is guilty of a misdemeanor. If the commitment was for the non-payment of a sum of money, the amount thereof, with interest, is the measure of damages.²

Where a prisoner, in a sheriff's custody, goes, or is at large, beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor, in an action against him, as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.³

The assent of the plaintiff's attorney will not be sufficient to relieve the sheriff, unless the debt is actually paid.⁴ If

¹ Code Civ. Pro., § 156; *Wilckens v. Willett*, 4 Abb. Dec., 596; *Barth v. Clise*, 12 Wall., 400.

² Code Civ. Pro., § 157. For the cases of commitment for "misconduct in a case prescribed by law." See *ante*, under the title of "Who entitled to jail liberties."

³ Code Civ. Pro., § 158; *Crane v. Stone*, 15 Kan., 94; *State v. Mullen*, 50 Ind., 598; *State v. Hamilton*, 33 id., 502.

⁴ *Crary v. Turner*, 6 Johns., 51; *Kellogg v. Gilbert*, 10 Johns., 220.

the attorney satisfy the judgment within two years after the filing of the judgment roll, the sheriff may release the prisoner, unless he knows that the attorney's rights and powers, as such, had been revoked before the acknowledgment of satisfaction.¹ As to manner of service of summons in an action against the sheriff for an escape, see *ante*, page 193, Code Civil Procedure, section 426, subdivision three. Although, in an action for an escape of one in custody by virtue of an order of arrest, the sheriff may give evidence of the debtor's insolvency in mitigation of damages,² he cannot do this when he stands as bail for the debtor's appearance. It does not enter into the engagement of bail that they shall be relieved if the debtor is unable to pay the debt. On the contrary, the engagement is to produce the body of their principal so as to be amenable to process, or, in default thereof, to pay the judgment.³ And, in such action, the sheriff cannot object that the order of arrest was improperly granted, or that the judgment or execution is irregular.⁴ The return of an execution against the person of the party in custody under an order of arrest, "*non est*," is sufficient evidence of his escape, and that the sheriff has not retained him in custody.⁵ Where, after executing an order of arrest, the sheriff permits the defendant to go at large, without giving bail or making a deposit, he becomes himself liable as bail.⁶ He also has the privilege and qualifications of bail; and he is entitled to discharge his liability in the same manner as is allowed to bail.⁷ Where the order of arrest is granted in an action to recover the possession of personal property, the sheriff's liability as special bail will not be satisfied by having the defendant, within his custody, amenable to process.⁸

¹ Code Civ. Pro., § 1260, subd. 1.

² *Patterson v. Westervelt*, 17 Wend., 543; *Potter v. Lansing*, 1 Johns., 215; *Russell v. Turner*, 7 id., 189; *Palmer v. Gallup*, 16 Conn., 555; *Weld v. Bartlett*, 10 Mass., 470.

³ *Metcalf v. Stryker*, 31 N. Y., 255; *Bensel v. Lynch*, 44 N. Y., 162.

⁴ *Bensel v. Lynch*, *supra*.

⁵ *Bensel v. Lynch*, *supra*.

⁶ *Id.*; Code Civ. Pro., § 587.

⁷ *Brady v. Brundage*, 59 N. Y., 310; and see Code Civ. Pro., §§ 595, 601.

⁸ *McKenzie v. Smith*, 48 N. Y., 143; *Metcalf v. Stryker*, *supra*; *Bensel v. Lynch*, *supra*.

When Action for Escape Brought.—There is no practice which requires an application to the court before the party claiming damages is authorized to bring an action for an escape. Such an action is founded upon the violation of duty by a public officer, in failing to execute a process legally and properly delivered to him for execution. Nor does it alter the sheriff's liability, because the arrest was made before judgment, upon an order of the court, or upon a writ issued under its order. While an application may be proper in cases against the sheriff where he has taken bail, and partially, at least, performed his duty, it by no means follows that the plaintiff must apply to the court before the commencement of a suit, when the sheriff has voluntarily or negligently suffered an escape.¹ But it does not seem to be necessary for the plaintiff to apply to the court, for leave to bring his action to charge the sheriff as special bail.²

An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution; or an action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate, must be brought within one year after the cause of action accrued.³ This provision of the Code does away with the distinction which the cases had made between acts done by an officer, "by virtue of his office," and acts done "under color of his office." Whatever the rule may have been heretofore, it now is as tersely stated in the provision itself.

Evidence.—In an action against a sheriff for an escape, the process under which he held the defendant in custody should be produced; otherwise its absence must be satisfactorily explained, in order to make parol testimony as to the contents and nature of the process unobjectionable.⁴ The return of the officer as to all facts relative to the arrest of which he was bound by law to make return, is conclusive against him; and if he have failed to make return, and have also refused to produce the process on notice, secondary

¹ Beckwith v. Smith, 4 Lans., 182.

⁴ Van Slyck v. Taylor, 9 Johns., 146.

² See Bensel v. Lynch, *supra*.

⁵ 2 Greenl. Ev., 529, § 589.

³ Code Civ. Pro., § 385.

evidence concerning it will be received.¹ If no return appears to have been made, the arrest may be shown by parol.² The fact of the escape must be affirmatively and positively shown, leaving nothing to be inferred;³ but the fact that defendant had been seen at large since being taken into custody is, *prima facie*, sufficient.⁴ Oral evidence that the prisoner was not in custody is always competent to prove the escape.⁵ And after showing the prisoner in custody under mesne process, a subsequent return of "*non est*" upon final process in the same action, is sufficient evidence of the escape.⁶ Ineffectual search for the defendant within the limits, and a letter from him mailed at a place without the limits, are facts competent to be proved to show the escape.⁷ The escape is always, in the absence of evidence, presumed to have been negligent;⁸ and such an escape may be proven though a voluntary one be alleged.⁹ Indeed, an allegation that the sheriff, against the will of the plaintiff, illegally suffered and permitted the judgment debtor to escape and go at large, out of his custody, merely means that he did not prevent him from so doing. It does not necessarily import or involve the allegation, that he in fact actively consented to the escape, or had any actual knowledge of it.¹⁰

In a case under subdivision one, of section 158, of the Code of Civil Procedure, or under section 157, if the commitment was not for the non-payment of a sum of money, the actual damages sustained by reason of the escape must be shown. *Prima facie*, however, the actual damages are the debt or claim, as evidenced by the final judgment, in the proceedings to recover which claim or debt, the defendant was in custody. The whole debt is presumed to be lost by the escape. And it lies upon the officer to show anything, as the

¹ *Hinman v. Brees*, 13 Johns., 529.

² *Hinman v. Brees*, 13 Johns., 529.

³ *Visscher v. Gansevoort*, 18 Johns., 496.

⁴ *Stewart v. Kip*, 7 Johns., 165.

⁵ *Fairlie v. Birch*, 3 Campb., 397.

⁶ *Bensel v. Lynch*, 44 N. Y., 162; *Wheeler v. Hambright*, 9 Serge. & Rawle (Penn.), 390, 395.

⁷ *Patterson v. Westervelt*, 17 Wend., 543.

⁸ *Patterson v. Westervelt*, *supra*; *Shattuck v. State*, 51 Miss., 575.

⁹ *Bonafons v. Walker*, 2 T. R., 126.

¹⁰ *Toll v. Alvord*, 64 Barb., 568; and see *Dunford v. Weaver*, 84 N. Y., 445.

insolvency of the debtor at the time of the escape, that would tend to mitigate or lessen the damages.¹ Whenever the sheriff is answerable for the debt, damages or sum of money, for which the prisoner was committed, interest is also recoverable.²

Defenses.—In an action against a sheriff or other officer, for the escape of a prisoner, it is a defense, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return, or by recapture.³ Within the provision of this section the action is not commenced until the summons is actually served.⁴ Section 426 of the Code of Civil Procedure tells us how the service may be made. Such service is completed by the delivery of the summons to the deputy or clerk of the defendant at a room, which is, in fact, the office of the defendant, although he has not notified the fact by filing notice in the county clerk's office as the statute directs.⁵ The defense authorized by section 171, cannot be proven under a general denial; it must be affirmatively alleged.⁶

If the debtor were in custody upon void process,⁷ or if he were not liable to arrest,⁸ or was exempt therefrom,⁹ the fact is a good defense to the sheriff in an action for his escape. But error in the judgment, or irregularity in the execution or other process, upon which the debtor was in custody, is no defense.¹⁰ And it is extremely doubtful if when sued for an escape, the sheriff can go back and raise a question which relates merely to the fact that the suit in which the debtor was in custody had not been properly commenced.¹¹ If the

¹ *Patterson v. Westervelt*, *supra*.

² *Dunford v. Weaver*, 84 N. Y., 445; aff'g S. C., 22 Hun, 349.

³ Code Civ. Pro., § 171.

⁴ *Wiggins v. Orser*, 5 Duer, 118.

⁵ *Dunford v. Weaver*, *supra*.

⁶ *Howland v. Squier*, 9 Cow., 91.

⁷ *Cornell v. Barnes*, 7 Hill, 35; *Carpentier v. Willett*, 1 Abb. App. Dec., 812; S. C., 1 Keyes, 510.

⁸ *Phelps v. Barton*, 13 Wend., 68.

⁹ *Ray v. Hogeboom*, 11 Johns., 433.

¹⁰ *Dunford v. Weaver*, 84 N. Y., 445; *Douglass v. Haberstro*, 25 Hun, 262; *Hutchinson v. Brand*, 9 N. Y., 208; *State v. Garrell*, 82 N. C., 580; *Cable v. Cooper*, 15 Johns., 152.

¹¹ *Maas v. O'Brien*, 14 Hun, 95.

sheriff rely for a defense upon an order of discharge, made by the court, "not only must the order show that it is in a matter over which the court or officer has general jurisdiction, but this being shown, other facts must be alleged and proven, showing that the particular person and case involved in that matter have, by certain proceedings, become subject to the jurisdiction of the court or officer in that instance. There must concur to make the order valid in fact, both the jurisdiction generally of the subject matter and the jurisdiction of the person and the individual case, acquired by special proceedings to that end. Both must be shown to establish jurisdiction. And if, without showing upon the trial facts to establish jurisdiction, the order alone is relied upon for a defence or justification, then the order must contain allegations of such facts."¹ And where the prisoner was insane and the order directing his discharge omitted to direct that he be sent to the asylum, it was held that the order did not protect the sheriff.² A discharge from imprisonment under the debtor's act, of a person held in custody on attachment for contempt, before conviction, is premature, and the sheriff who discharges him accordingly is liable for costs.³ But if a valid order for discharge is made the sheriff may justify under it, although it was not formally served upon him.⁴ A stay of proceedings on appeal, or otherwise, after defendant is arrested on execution, does not discharge him; the sheriff is still liable for a previous escape.⁵ The assent of the plaintiff, if given previous to the debtor's escape, will excuse it. But the right of action for an escape once having accrued, nothing but a release, or an agreement, on consideration can defeat the action.⁶ The sheriff should take care to secure, if possible, a release in writing and under seal. In a popular action,

¹ Per Folger, J., in *Bulymore v. Cooper*, 46 N. Y., 242, citing *Bennett v. Durch*, 1 Denio, 141; and see *Cautillon v. Graves*, 8 Johns., 472; *Cable v. Cooper*, 15 id., 152; *Wiles v. Brown*, 3 Barb., 27; *Hart v. Dubois*, 20 Wend., 236.

² *Bush v. Pettibone*, 4 N. Y., 300; aff'g S. C., 5 Barb., 273.

³ *Jackson v. Smith*, 5 Johns., 115.

⁴ *Richmond v. Prait*, 24 Hun, 578.

⁵ *Sherrill v. Campbell*, 21 Wend., 287.

⁶ *Sweet v. Palmer*, 16 Johns., 181; *Powers v. Wilson*, 7 Cow., 274; *Weason v. Chamberlain*, 3 N. Y., 331.

the plaintiff cannot release where the whole, or a part, of the penalty belongs to the people.¹ And where the release is by a third party, clear and decisive evidence of his authority should be given.² The fact that the form of declaring in the original, suit entitled the debtor to his discharge does not avail the sheriff.³ Although an officer has sixty days within which to return an execution, and need not arrest the defendant until the last of the sixty days, yet, if he arrest him before and then permit him to go at large, he is liable for an escape.⁴ Where the solvency of the debtor may be proven in mitigation of damages, it may be so proven under the general denial.⁵ General reputation of insolvency, however, is inadmissible to prove it.⁶ Where it appears that the debtor has been adjudicated a bankrupt, if insolvency is proper to be shown, as where the escape was suffered while the debtor was in custody on an order of arrest, it should be held that no actual damage could have been suffered by plaintiff.⁷ The true question in such case is, what has the plaintiff lost in consequence of the escape? Where the evidence is not contradictory, and clearly shows no loss, it should so be held as matter of law. Or, where it appears that the plaintiff had ample security, and voluntarily released it after he knew of the escape, the plaintiff is not entitled to recover. The situation of the sheriff is analogous to that of a surety; and the law will not tolerate or endure any connivance between the creditor and the principal debtor, to the prejudice of the surety.⁸ The Code clearly provides that the sheriff may be held as surety or bail.⁹ And the common law gives the action for an escape. In either case the plaintiff deals with him in a certain sense

¹ *Minton v. Woodworth*, 11 Johns., 474.

² *Crary v. Turner*, 6 Johns., 51.

³ *Fairchild v. Case*, 24 Wend., 381.

⁴ *Pulver v. McIntyre*, 13 Johns., 503; *Richardson v. Rittenhouse*, 40 N. J. L., 230.

⁵ *Barnes v. Willett*, 25 Barb., 514; *Smith v. Knapp*, 30 N. Y., 581, 592.

⁶ *Fairchild v. Case*, 24 Wend., 381; as to the method of proving insolvency, see *Abbott's Trial Evidence*, 616, *et seq.*

⁷ *Maas v. O'Brien*, 14 Hun, 95.

⁸ *Russell v. Turner*, 7 Johns., 189.

⁹ Code Civ. Pro., § 587.

as surety. The plaintiff has an election which of these remedies he will adopt, and that election is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail; and must demand the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant, as bail, would be omitted, as wholly irrelevant to the cause of action.¹ Any sheriff or jailer willfully suffering any person committed or recommitted because he refused to be sworn, or to answer satisfactorily lawful questions put to him on his examination relative to an insolvent debtor's property, or refused to sign the examination, not having a reasonable objection thereto, to escape, shall be liable to indictment for a misdemeanor; and, on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees of such insolvent debtor a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding \$2,500.²

The sheriff's liabilities for the escape of one arrested under criminal process, are such only as the criminal law prescribes by way of punishment; and are detailed in other parts of this work. He never is, in such case, liable, at any person's suit, in a civil action. Where the custody is under civil process, the sheriff is liable, criminally, for willfully and corruptly permitting, etc., an escape, as well as civilly for an escape of any kind.

What is an Escape.—An officer having a prisoner in his custody on civil process, should take him to the jail with all convenient and reasonable diligence, and he should not relax but for some laudable and compassionate purpose. Otherwise he suffers an escape. But the going with the prisoner two or three miles out of the direct route to the jail, for the purpose of enabling the latter to try to settle the execution and to get his clothes, and see his family before going to the jail has been held not to be an escape.³

¹ *Smith v. Knapp*, 30 N. Y., 581; and see *Metcalf v. Stryker*, 31 id., 255; *Bensel v. Lynch*, 44 id., 162.

² 3 R. S. (5th ed.), 118, § 18; id. (6th ed.), 39, § 18, id. (7th ed.), 2269, § 16.

³ *Wool v. Turner*, 10 Johns., 420; and see *Benton v. Sutton*, 1 Bos. & Pull., 24.

Where a prisoner is in close confinement on civil process, and, before he is released therefrom, another process on which he may be held is delivered to the sheriff, the prisoner is, *ipso facto* and *eo instanti*, in custody under the latter process in judgment of law.¹ Not so, however, if he be admitted to the limits; in such case, the mere delivery of the execution is not an arrest, such as would make the sheriff liable for an escape.² But if a new sheriff regularly receives a prisoner from his predecessor, he is bound to detain him, and is answerable for his escape, although a voluntary escape may have existed in the time of his predecessor.³ So, where a constable takes a debtor in execution, and permits him to go at large on his promise to return next day and give bail; and the next day the debtor appears at the jail, where the execution had been left, and gives a bond for the limits, and afterwards leaves them, it is an escape for which the sheriff is liable.⁴ Arresting one on civil process, and leaving him in custody of one not an officer, is not an escape.⁵ A sheriff who permits one in his custody to be taken therefrom, upon the warrant of a justice on a criminal charge, suffers an escape.⁶ Going beyond the limits on pretense of avoiding snow on a walk is an escape.⁷ But if the debtor is induced, by artifice or trick, to quit the limits, whether by plaintiff, or, without his knowledge, by others acting for his benefit, plaintiff cannot avail himself of the fraud and hold the sheriff.⁸ As to what amounts to an escape when the prisoner is without the limits on *habeas corpus*, or other special direction of the court committing him, see *ante*, subdivisions one and two, section one, chapter five, pages 413, 422, 423.

¹ Frost's Case, 5 Co., 89.

² Tracy v. Whipple, 8 Johns., 379.

³ Rawson v. Turner, 4 Johns., 469, and cases there cited, at p. 473.

⁴ Stickle v. Reed, 23 Hun, 417.

⁵ Palmer v. Hatch, 9 Johns., 329; Wheeler v. Bailey, 13 id., 366.

⁶ Brown v. Tracy, 9 How. Pr., 93; but see Wilckens v. Willett, 1 Keyes, 521; aff'g, Wickelhausen v. Willett, 12 Abb. Pr., 319; 21 How. Pr., 40.

⁷ Bissel v. Kip, 5 Johns., 89.

⁸ Dexter v. Adams, 2 Denio, 646; and see Van Wormer v. Van Voast, 10 Wend., 356.

SECTION III.

OF ACTIONS AGAINST SHERIFFS GENERALLY.

1. *Of Sheriff's Liability for Acts of his Deputies.*

In law the sheriff and his deputies are considered one officer. Hence the sheriff is, *civilly*, liable for all the acts and omissions of his deputies, *as deputies*, as if he, himself, had performed the acts, or was guilty of the omissions.¹ An action lies against him for the act of his deputy in taking more fees on executing process than the law allows.² He is responsible for moneys collected on process by his deputies,³ even though the process be erroneous, so long as it is not void upon its face.⁴ In an action against him for his deputy's default, a sheriff cannot falsify the deputy's return.⁵ But the burden is on the plaintiff to show that the person defaulting was defendant's deputy.⁶ It is sufficient to show that the person has acted generally as a deputy, with the sheriff's knowledge and consent; and the sheriff's admission of the deputation sufficiently proves it.⁸ The declarations and admissions of the deputy in regard to process then being in his hands for execution are admissible in evidence against the sheriff.⁹ But the sheriff is liable for the acts of his deputy only so far as they are performed in the ordinary course of his official duty. If there be a departure from the ordinary execution of his office by the deputy, under the instructions of the plaintiff, or his attorney, the sheriff is not responsible.¹⁰ Thus, in any proceeding to "fix

¹ Pond v. Leman, 45 Barb., 152; Moulton v. Norton, 5 id., 286; Watson v. Todd, 5 Mass., 271; Jentry v. Hunt, 2 McCord (S. C.), 410; Clute v. Goodell, 2 McLean (U. S.), 193; Harrington v. Fuller, 18 Me., 277; Buck v. Ashley, 37 Vt., 475; Stevens v. Colby, 46 N. H., 163; Thrift v. Fritzt, 7 Ill. App., 55.

² McIntyre v. Trumbull, 7 Johns., 35.

³ Evans v. Hayes, 1 Miss., 697.

⁴ People v. Dunning, 1 Wend., 16.

⁵ Gardner v. Hosmer, 6 Mass., 325.

⁶ Flourney v. Rubey, 1 J. J. Marsh. (Ky.), 560.

⁷ Bosley v. Farquar, 2 Blackf. (Ind.), 61.

⁸ Deliesseline v. Bunch, Harper (S. C.), 226.

⁹ Mott v. Kip, 10 Johns., 478.

¹⁰ Gorham v. Gale, 7 Cow., 739; S. C., 6 id., 467, note; Corning v. Southland, 3 Hill, 552; McKinley v. Tucker, 6 Lans., 214; Mickles v. Hart, 1 Denio, 548; Ansonia Brass, etc., Co. v. Babbitt, 74 N. Y., 395; Smith v. Erwin, 77 N. Y., 466.

up" an execution in the hands of a deputy sheriff for collection, by taking an indorsed note from the judgment debtor under the instruction of the creditor, the deputy would be acting as agent for the creditor and not in his official capacity, and the sheriff would not be liable for his default in neglecting to collect the amount of the execution.¹ So, an action of trespass will not lie against the sheriff for the act of his deputy in taking possession of property attached by him on a writ while acting as deputy of a former sheriff, no judgment having been rendered on the writ, and the possession being demanded and received, by virtue of a receipt taken of the plaintiff and another at the time of the attachment, in which they agreed to safely keep the property attached, and deliver it to the officer on demand.²

A sheriff cannot defend an action brought against him for a wrongful levy made by his deputy, by setting up defects in his bond, or qualification, to impeach his own title to the office.³

A sheriff is never liable, criminally, for the acts of any of his deputies. A satisfaction of a judgment in an action against the deputy to recover damages for an official misconduct would be a bar to an action against the sheriff for the same misconduct. And the payment and acceptance of a fine sufficient to indemnify the party aggrieved, in proceedings against the officer as for a contempt of court, constitutes a bar to an action by the aggrieved party, to recover damages for the loss or injury.⁴

2. *Action for Neglect of Duty.*

Failure to Make Return.—"A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision, he is liable to the party aggrieved, for the damages sustained by him; in addition to any fine, or other punishment, or proceeding, authorized by law. A mandate directed and delivered to a sheriff may be returned, by depositing the same in the post-office, properly inclosed in a postpaid wrapper, addressed to the clerk, at the place

¹ Dyer v. Tilton, 71 Me., 413.

² Barden v. Douglass, 71 Me., 400.

³ Sprague v. Brown, 40 Wis., 612.

⁴ Code Civ. Pro., § 2284.

where his office is situated; unless the officer, making the return in the name of the sheriff, resides in the place where the clerk's office is situated.'''

The action thus given by the Code, and formerly by Revised Statutes, did not exist at common law against a sheriff for a mere omission of duty. The practice was to compel a return, and seek a remedy upon that if untrue.¹ In this action it is not necessary for the plaintiff to allege or prove special damages. He needs only to allege the simple facts, showing a valid process upon which money was to be collected, rightfully in the hands of the sheriff or one of his deputies, and a failure to make return of the process and the proceedings thereon. *Prima facie* the amount of the process, if it be an ordinary execution, is the measure of damages. The sheriff may show, in mitigation, that the execution debtor had not sufficient property out of which to make the execution, or any part of it. The plaintiff's case for damages is made out by the execution itself. The sheriff must diminish it, if he can, by showing how little might have been made for plaintiff, had the defendant properly executed the process. The plaintiff will recover as much less than the amount called for by the execution, as the sheriff is able to show he could not have made out of the property of the execution debtor.² When a right of action has accrued against a sheriff, for neglecting to return an execution, such right cannot be divested by an appeal being taken from the judgment, by the defendant therein, even though the appeal be brought prior to the commencement of the action.³ The sheriff is liable for the amount of the execution, even where he has seized property thereunder, which has been taken from him by replevin process, when he succeeds in the replevin proceedings. In such case it is his duty to prosecute the sureties in the undertaking of

¹ Code Civ. Pro., § 102.

² *Peck v. Hurlburt*, 46 Barb., 559; *Swezey v. Lott*, 21 N. Y., 481.

³ *Ledyard v. Jones*, 7 N. Y., 550; *Bank of Rome v. Curtis*, 1 Hill, 275; *Dolson v. Saxton*, 11 Hun, 565; *Hoffman v. Conner*, 13 Hun, 541; *Swezey v. Lott*, 21 N. Y., 481; *Harris v. Murfree*, 54 Ala., 161; *Royse v. Reynolds*, 10 Bush (Ky.), 286; *Baker v. Bower*, 44 Ga., 14; *Pardee v. Robertson*, 6 Hill., 550; *Dunphy v. Whipple*, 25 Mich., 10; *State v. Lawrence*, 64 N. C., 483; but see *State v. Blanch*, 70 Ind., 204.

⁴ *Bowman v. Cornell*, 39 Barb., 69.

the plaintiff in replevin. He is not entitled to indemnity from the plaintiff in the execution, as a condition of his prosecuting the undertaking.¹

It is no defense to an action against the sheriff for not returning an execution, to show that it was returned a few days after the expiration of the sixty days.² But after the commencement of such action, the sheriff may make a return of "*nulla bona*," and the return will be competent evidence in his favor; if uncontradicted the plaintiff will be entitled to nominal damages only.³

The sheriff may show in defense that the plaintiff has less interest in the execution, for the failure to return which he is sued, than the face of it; and that he has no right to demand the full amount thereof.⁴ He may also show that the judgment was fraudulent and void; that it has been paid, assigned and does not belong to plaintiff.⁵ He may also show that the plaintiff had directed the execution not to be returned, or that the sheriff had procured it to be stayed by the order of the court.⁶ Anything, in fact, which attacks the judgment or shows that the plaintiff's interest is affected, is a good and valid defense to the action. Thus he may show that prior to the return day the plaintiff's interest in the judgment was levied upon by virtue of an attachment, and was liable to be applied thereon.⁷ And the fact that the sheriff failed to make a valid levy by virtue of the execution, does not destroy or weaken the effect of the proof in mitigation.⁸ In short, the plaintiff is entitled to recover no more damages than he has actually sustained.

In rebuttal plaintiff may show that the judgment debtor had property, if the defendant has attempted to show him insolvent.⁹

¹ Swezey v Lott, 21 N. Y., 481.

² Brookfield v. Remsen, 1 Abb. App. Dec., 210.

³ Bechstein v Sammis, 10 Hun, 585; Glover v. Whittenhall, 2 Denio, 633; Birkbeck v. Stafford, 14 Abb. Pr., 285.

⁴ Wehle v. Conner, 69 N. Y., 546.

⁵ Id.; Cornell v. Barnes, 7 Hill, 35.

⁶ Root v. Wagner, 30 N. Y., 9; Homan v. Liswell, 6 Cow., 659; Humphrey Hathorn, 24 Barb., 278.

⁷ Wehle v. Conner, 69 N. Y., 546; Same v. Same, 63 id., 258; and see Cromwell v. Gallup, 17 Hun, 49.

⁸ Wehle v. Conner, 83 N. Y., 231.

⁹ Pardee v. Robertson, 6 Hill, 550

Failure to Serve or Collect Process.—In an action against a sheriff for neglecting his duty under an execution, the plaintiff must show a valid judgment upon which the execution issued.¹ It is not necessary, however, to show a judgment regular in all respects. The sheriff cannot take advantage of a mere irregularity in the judgment, rendering it voidable but not void.² A certified copy of an order for judgment, made by the county court, directing the reversal of the judgment of a justice of the peace, and directing judgment for the amount of the alleged judgment, is not sufficient to prove the existence of such judgment.³ If the judgment on which the process issues is a justice's judgment, jurisdiction of the subject matter, and of the person, should also be proved.⁴

The action for a failure to serve or collect process, or for a failure to return, or for a false return of process, may be maintained by the assignee of the judgment creditor, as well as by the creditor, himself.⁵ If the neglect is in regard to some process before judgment, some evidence of the cause of action must be given; and here the admission of the defendant in the process would be competent. The delivery of the process to the officer may be shown by parol; but if a return has been made the returned process, or a certified copy thereof, is sufficient to show its issuance and its delivery to the officer to be executed. Failing its return, the process should be produced, or its absence accounted for, and then proved by secondary evidence. Some evidence tending to show the officer's ability to execute the process, should be given. Thus it should be shown that the defendant in the process was in the county, or that goods were within the jurisdiction of the officer which might have been seized under the process.⁶ Where the plaintiff has shown the officer's ability to execute the process, as that the de-

¹ McDonald v. Bunn, 3 Denio, 45; Newberg v. Munshower, 29 Ohio St., 617.

² Ames v. Webbers, 8 Wend., 545; Parmelee v. Hitchcock, 12 id., 96; Carpenter v. Willett, 28 How. Pr., 225; S. C., 31 N. Y., 90; State v. Miller, 48 Mo., 251.

³ Forsyth v. Campbell, 15 Hun, 235.

⁴ Westbrook v. Douglass, 21 Barb., 602; Cornell v. Barnes, 7 Hill, 35; Lawton v. Erwin, 9 Wend., 233.

⁵ Dininny v. Fay, 38 Barb., 18; Jackson v. Daggett, 11 Week. Dig., 545

⁶ Abbott's Trial Ev., 606; Lyendecker v. Martin, 38 Tex., 287.

fendant, or that goods which might rightfully have been seized were in the officer's jurisdiction, it is for the latter to show, affirmatively, a good excuse for his failure to perform his duty, as that the defendant was privileged from or not liable to arrest, or that the property was exempt from seizure.¹ In fact, he may show anything in defense to an action for neglect to serve or collect process which he could show in defense of an action against him for a failure to make return. But he is estopped, where he takes a receiptor for the property, from showing that the receiptor was the owner, or entitled to the possession of the property.² If, on execution, the sheriff levy upon property sufficient to satisfy the process, and take the goods actually into his possession, he is accountable for its loss, or destruction, only to the extent which a prudent man would care for his own property. If he leave them in another's custody, nothing but the act of God, or of public enemies, will excuse the failure to apply the property in satisfaction of the process.

Where a sheriff refuses to arrest or imprison a person upon an order of arrest, the plaintiff has two remedies against him :

1. An action against him as bail under sections 587, 595 and 597 of the Code of Civil Procedure.

2. An action for the omission of his official duty under section 385 (§ 102?) of said Code.

The former action cannot be maintained until the plaintiff has recovered judgment against the prisoner and issued execution against his property and against his person, and until return has been made as to the first, of no property, and as to the second, of not found (§ 597 *supra*). The damages recoverable in such an action are fixed by the amount of the judgment against the prisoner.³

An officer cannot show, in defense of an action for neglecting to make and pay over the money upon an attachment issued to him, that the suit in which it issued was prose-

¹ *Bank of Rome v. Curtis*, 1 Hill, 275; *Terrell v. State*, 66 Ind., 570; *Bonnell v. Bowman*, 53 Ill., 460; *Baker v. Brintnall*, 52 Barb., 188; *People ex rel. Gaston v. Campbell*, 40 N. Y., 133.

² *People ex rel. Knapp v. Reeder*, 25 N. Y., 302; *Penobscot Boom Corporation v. Wilkins*, 27 Me., 345.

³ N. Y. C. P., 1881, *Cosgrove v. Bowe*, 4 Law Bull., 7.

cuted by collusion between the plaintiff and the defendant in the attachment, with intent to defraud the creditors of the latter.¹

Non-payment of Moneys Collected.—Immediately after the return day, but not before, an action may be maintained, without previous demand, against the sheriff for the amount collected upon an execution, if the same has not been paid over to the creditor, or into court.² If the officer has made return of the moneys collected, such return is sufficient and conclusive evidence against him. But it does not prove that he paid the money over to the creditor; and such payment will not be presumed.³ The return, though made by his deputy, cannot be impeached by the sheriff.⁴ And, where the execution is held by the deputy, with the knowledge and consent of the sheriff and of the plaintiff, beyond the return day, for the purpose of receiving the money thereon, the sheriff's liability is continued, to account for and pay over the money so received by his deputy.⁵ And the admissions of the sheriff in conversation with his deputy about the execution, and the money received on it, are evidence against him.⁶ The levy and the receipt of the money may be shown by parol.⁷ As in all other cases, the sheriff may here show that the process was absolutely void. But he cannot avail himself of mere irregularities, either in the process, or in the judgment upon which the same was founded.⁸ He may not, as a general rule, show that the goods from which the moneys were made were not those of the defendant.⁹ But when, upon motion to compel payment of surplus, such defendant, has put himself on record, under oath, that the property taken belonged to his wife, and that he had no interest therein, his right to recover the alleged sur-

¹ *Seaver v. Pierce*, 42 Vt., 325.

² *Nelson v. Kerr*, 59 N. Y., 224.

³ *Townsend v. Olin*, 5 Wend., 207; *Armstrong v. Garrow*, 6 Cow., 465; *Mosely v. Hamilton*, 4 Baxter (Tenn.), 434.

⁴ *Sheldon v. Payne*, 7 N. Y., 453; S. C., 10 id., 398.

⁵ *Ross v. Campbell*, 19 Hun, 615; see, too, *Norton v. Nye*, 56 Me., 211.

⁶ *Williams v. Sargeant*, 46 N. Y., 481.

⁷ *Bryant v. Dana*, 8 Ill., 343.

⁸ *James v. Gurley*, 48 N. Y., 163. Having treated the process as valid, the sheriff cannot refuse to answer for the money collected thereon. *Ib.*

⁹ But see *Every v. Edgerton*, 7 Wend., 259; *Newland v. Baker*, 21 id., 264.

plus is not so clear that the court should enforce it on a summary application.¹ Such motion, as well as an action for the non-payment of money collected upon an execution, comes under the three year statute of limitations.² Where a sheriff pays over proceeds of property sold on execution to a junior execution creditor, under an order of the court in proceedings to which the senior execution creditor was not a party, he is not thereby released from liability to such senior creditor.³ Where the sheriff sells the property of the defendant in an execution, for a larger sum than was due thereon, and, though requested by defendant not to do so, conveys to the purchaser without receiving from him the surplus money, such defendant may maintain an action on the case for so doing.⁴

Where a sheriff, who, at the expiration of his term of office, has in his hands process not fully executed, dies before the complete execution thereof, his late under-sheriff becomes substituted in his place in respect to such process, and for moneys collected by him, by virtue thereof, is personally liable.⁵ But if a deputy receives an execution, and is afterwards appointed sheriff, and then realizes the money on the execution, it is received by him as deputy, and not as sheriff, and the former sheriff will be liable to an action therefor, and not the bail of such new sheriff.⁶

Where a sheriff retains and uses moneys in his hands during the pendency of an action to determine conflicting claims thereto, in disobedience of an order of court, entered upon stipulation of the parties directing a deposit thereof, he is properly chargeable with interest thereon.⁷

False Return.—In an action against a sheriff for a false return to final process, plaintiff must prove a valid judgment to uphold the process. If the return be to mesne process,⁸ he must prove a good cause of action.⁹ The issue, delivery

¹ Frankel v. Elias, 60 How. Pr., 74.

² Code Civ. Pro., § 383; Frankel v. Elias, *supra*.

³ State v. Boles, 13 S. C., 283.

⁴ Coats v. Stewart, 19 Johns., 298.

⁵ Newman v. Beckwith, 61 N. Y., 205.

⁶ People ex rel. Bacon v. McHenry, 19 Wend., 482.

⁷ Thompson v. Sweet, 73 N. Y., 622.

⁸ McDonald v. Bunn, 3 Denio, 45.

⁹ Parker v. Fenn, 2 Esp., 477, *note*.

and return of the process must be shown; and generally these facts may be sufficiently proven, by the production of the process, with the officer's indorsement of a return thereon.¹ If the return was made by a deputy of the defendant, the fact that the officer making the return was a deputy must also be shown. This can be done by showing that he acted as deputy, and that defendant knew it. A return amended by leave of court, though after action commenced, may be read in evidence with the same effect as if an original return.² The burden is upon plaintiff to show the falsity of the return.³ Slight evidence, however, suffices to put the sheriff on his defense.⁴ Thus, where the return is "*nulla bona*" evidence that the debtor had the possession of goods, will suffice to show the return false, and it is then with the sheriff to show that the debtor was not the owner of the goods, and had no leviable interest in them.⁵ That the return is false is a fact essential to plaintiff's case, and the preponderance of proof must be with him, or the defendant is entitled to a verdict. It has been held that a sheriff is justified in returning "*nulla bona*" an execution before it runs out, provided he made a fair and honest effort to determine whether the execution debtor had any property, on which he could levy, and could not find any.⁶ Where the plaintiff makes it appear that the sheriff has levied upon property sufficient to satisfy the execution, and then returned it unsatisfied, he is, *prima facie*, entitled to a judgment for the amount of the execution and interest. It is then incumbent upon the sheriff, in order to relieve himself from liability, to show some legal excuse for not collecting the execution. The fact that the property, subsequent to the levy, was taken by a marshal under a warrant in bankruptcy proceedings against the execution debtor, and by him turned over to the assignee, does not exonerate the sheriff from liability, although

¹ Williams v. Lowndes, 1 Hall, 578, 597.

² People v. Ames, 35 N. Y., 482; Bradford v. Read, 2 Sandf. 163; Anderson v. Sloan, 1 Col. T., 33.

³ Watson v. Brennan, 66 N. Y., 621; rev'g S. C., 39 Super. Ct., 81.

⁴ Holbrook v. Brennan, 6 Daly, 50.

⁵ Magne v. Seymour, 5 Wend., 309.

⁶ Sup. Ct., 1881; Cross v. Williams, 12 Week. Dig., 426.

the property was taken without his consent and against his protest. No right of possession vested in the assignee, or in the marshal, until the execution was satisfied.¹ But it will be a good defense to the sheriff if the plaintiff, subsequent to the levy of which he had knowledge, proved his debt before the register in bankruptcy as a debt arising upon judgment, without referring to or disclosing the lien by virtue of the execution.² It will also be a defense, if, knowing of the levy and of the subsequent seizure of the goods by the marshal, the plaintiff gave the sheriff a peremptory direction to return the execution *immediately*, which the sheriff obeyed, making a special return setting forth the proceedings in bankruptcy, and that he had retained the execution by the direction of the plaintiff, and now returned it by his direction, "nothing having been collected thereon."³ No action will lie against a sheriff for any act done by his deputies under and in relation to the execution, in obedience to the plaintiff or to the directions of the attorney who issued it.⁴ And the rule applies, although the attorney's authority ceases with the issuance of execution, as where, thereafter, the judgment is assigned, unless the sheriff has notice of the fact.⁵ If, after levy made, the property is claimed by a third party, and, upon inquisition, the claim is substantiated and execution creditors refuse to indemnify the officer, these facts will be a complete defense to an action against the officer for a false return of "*nulla bona*."⁶ But if the sheriff surrender the property without calling a jury to try the title, he assumes the burden of showing the property was not subject to the process. And where he has levied under an execution, and has taken the property into his possession, and, thereafter, a general

¹ *Ansonia Brass, etc., Co. v. Babbitt* 74 N. Y., 395; *Lummis v. Kasson*, 43 Barb., 373.

² *Ansonia Brass, etc., Co. v. Babbitt*, *supra*; *Stewart v. Isidor*, 1 B. R., 480; *Grugeon v. Gerrard*, 4 Y. & Collyer, 119; *ex parte Solomon*, 1 G. & J., 25; *ex parte Hornby*, Buck's Cas. Bank., 351.

³ *Ansonia Brass Co. v. Babbitt*, *supra*; and see *Bohen v. State*, 5 Blackf. (Ind.), 467.

⁴ *Mickles v. Hart*, 1 Denio, 548; *Sheldon v. Payne*, 7 N. Y., 453; *Gorham v. Gale*, 7 Cow., 739; *Acker v. Ledyard*, 8 Barb., 514.

⁵ *Robinson v. Brennan*, 11 Hun, 368.

⁶ Code Civ. Pro., § 1419.

assignment for the benefit of creditors is duly made by the debtor, and subsequently an attachment comes into his hands, and he sells sufficient of the property to satisfy the execution, delivers the balance to the assignee and returns "*nulla bona*" to the attachment, the facts make a good defense in an action for a false return to the attachment.¹ If no return of a levy is made, to prove a levy by parol, enough must be shown to make the officer a trespasser but for the process.²

A complaint for a false return on execution, need not allege deceit or fraud: it is enough that the return is untrue.³ And in an action for failure to return an execution, the complaint alleging that the execution defendant had, during the life of the writ, abundant personal property upon which a levy might have been made, it is error to require the plaintiff to elect whether he will proceed for the non-return, or for the false return, of the execution.⁴ It is a defense to an action for a false return of "*nulla bona*" that the judgment on which the execution issued has since been reversed.⁵ And where property is shown in the hands of the execution debtor, it is a good defense that the property was completely absorbed by prior executions. But the mere issuing of a prior execution is no defense in itself, nor can the sheriff stultify his own return so as to justify under another execution which he has also returned unsatisfied. It matters not how many executions the sheriff may have had, unless there is some averment showing that they affected plaintiff's execution.⁶ If the defense of the sheriff is based upon a prior execution, or upon an alleged prior assignment and sale from the debtor to a third party, the plaintiff may show the execution, or the sale, to be fraudulent and void to the knowledge of the sheriff. The sheriff is not bound to assume that an execution, or a sale, was fraudulent. It is no defense that the

¹ *Mumper v. Rushmore*, 79 N. Y., 19.

² *Camp v. Chamberlain*, 5 Denio, 198; *Bond v. Willett*, 1 Abb. Ct. App. Dec., 165.

³ *Peebles v. Newton*, 74 N. C., 473.

⁴ Sup. Ct., 1881; *Jordan v. Reilly*, 12 Week. Dig., 184.

⁵ *Inman v. McNeil*, 57 How. Pr., 151.

⁶ *Johnson v. Reilly*, 59 How. Pr., 354; *Paton v. Westervelt*, 2 Duer, 362; See *Chase v. Bell*, 32 La. Ann., 460.

judgment debtor, against whom the execution was issued, held the property, which had been levied on, by an assignment fraudulent as to one of the assignors, if another of them had the right to convey.¹

Under an execution, in the usual form in an action for the claim and delivery of personal property, it is the duty of the sheriff to take and deliver the property as commanded, not only if he finds it in the possession of any person named therein, but also if he finds it in the possession of any other person; unless he can justify his refusal to do so by showing that such person has a title, or right of possession, superior to that of the party to whom he is commanded to deliver it. Where, therefore, to such an execution, the sheriff returned that he could not find the property so as to make delivery, and it appeared in an action against him for a false return, that he knew where the property was, within his county, and could have found it, but refused to take it, or to take any action in regard thereto, upon the sole ground that it was in the possession of a third party, in the absence of proof that such third party was entitled to the possession as against the plaintiff, it was held that the sheriff was liable.²

The return by a sheriff to an execution against the person of "not found," subjects the bail of the defendant to an action upon his undertaking, and is conclusive upon him in that action. If the return is false the bail has a right of action against the sheriff for his damages sustained by reason of the false return.³

To prove falsity of a return of "not found," the fact that the debtor did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly as usual, and was visible to all who came to him on business, is sufficient evidence that he could have been arrested.⁴ But it cannot be said, as matter of law, in an action for making a false return of not found, that the sheriff's neglect to inquire of the

¹ Colwell v. Bleakley, 1 Abb. App. Dec., 400.

² Hoffman v. Conner, 76 N. Y., 121.

³ Cozine v. Walter, 55 N. Y., 304; Bradley v. Bishop, 7 Wend., 352; Kidder v. Parlin, 7 Greenl., 80; McArthur v. Pease, 46 Barb., 423.

⁴ Beckford v. Montague, 2 Esp., 475.

plaintiff in the execution, as to the defendant's whereabouts, tended to show negligence.¹

The measure of damages in an action against a sheriff for a false return, is the amount directed to be collected upon the execution, where there is sufficient property shown to levy it upon. The sheriff cannot show that the amount so directed to be levied was not due upon the judgment.² If the return be *nulla bona*, and property be shown in the hands of the debtor, it is for the sheriff to show how much less than the entire amount, directed to be levied, could have been made out of the property, in order to reduce the damages.

The sheriff's knowledge that the return is false, will not alone aggravate the damages.³

Unlawful Seizure of Property or Arrest of Person.—No demand is necessary before suing a sheriff for personal property, taken by him on execution or attachment against another,⁴ unless the execution debtor, is in possession of, and exercising acts of ownership over it.⁵ But if the sheriff, having an execution against one who has bought goods, but refused to take and pay for them, seizes the goods while directed to such buyer, they being unclaimed by any other person, a demand is necessary before an action for the conversion will lie against him.⁶ But where goods are fraudulently procured by the buyer without intention to pay for them, the seller may, without demand, maintain an action against the sheriff who takes the goods as the property of the buyer.⁷ An officer who levies, and the creditor by whose direction he does so, upon property of another person than the execution debtor, and for which he requires a receiptor, are trespassers.⁸ Mere levy, without removing the property, or in any other way interfering with it, is

¹ Koch v. Coots, 43 Mich., 30.

² Bacon v. Cropsey, 7 N. Y., 195.

³ Potter v. Lansing, 1 Johns., 215.

⁴ Kluender v. Lynch, 2 Abb. App. Dec., 538; Wellman v. English, 38 Cal., 583; Kuhlman v. Orser, 5 Duer, 242.

⁵ Masten v. Webb, 60 How. Pr., 302; Shaw v. Davis, 55 Barb., 389.

⁶ Hicks v. Cleveland, 39 Barb., 573.

⁷ Acker v. Campbell, 23 Wend., 372.

⁸ Fonda v. Van Horne, 15 Wend., 631; Franklin v. Gumersell, 9 Mo. App., 84; Allen v. Crary, 10 Wend., 349.

sufficient to sustain an action of trespass.¹ If exempt property is taken under execution, an action may be maintained therefor. In such action the plaintiff, before he arrests, needs only to prove the taking and the damages. The officer should then prove his process or other authority for the taking, and, in rebuttal, the plaintiff may prove the exemption.² An officer attaching goods of a stranger, intermingled with those of the debtor, so as not to be distinguishable therefrom by the officer, is not liable in trespass at the suit of such stranger, unless he points out his goods and demands them, or seasonably offers so to do.³ Selling personal property under execution, without giving the statutory notice, makes the officer a trespasser *ab initio*.⁴ Where the property is taken on replevin process as prescribed by the Code of Civil Procedure, the officer is not liable to an action therefor by a third party claiming the property, unless the latter has complied with sections 1709 and 1710 of said Code.

An officer can always justify the arrest of a person, or the seizure of his property, within his jurisdiction, under process directing such arrest or seizure, unless such process is absolutely void.⁵ If the property is claimed to be exempt from seizure, the officer may justify the seizure by showing the owner's consent, except where the process is issued upon a judgment which, or some part of which, was recovered for the sale of intoxicating liquors.⁶ He may also justify the seizure by showing that the judgment on which the process issued was for the purchase price of exempt property, or for work performed in the judgment debtor's family as a domestic.⁷ Of course the process will afford no protection to the officer against an action for an abuse in executing

¹ *Stevens v. Somerindyke*, 4 E. D. Smith, 418; *Wintringham v. Lafoy*, 7 Cow., 735; *Stewart v. Wells*, 6 Barb., 79; *Phillips v. Hall*, 8 Wend., 610; *Neff v. Thompson*, 8 Barb., 213; *Alvord v. Haynes*, 13 Hun, 26.

² *Dennis v. Snell*, 54 Barb., 415.

³ *Yates v. Wormell*, 60 Me., 495; *Shumway v. Rutter*, 8 Pick., 441; *Wellington v. Sedgwick*, 12 Cal. 476.

⁴ *Hayes v. Buzzell*, 60 Me., 205; *Carrier v. Esbaugh*, 70 Penn. St., 239.

⁵ *Savacool v. Boughton*, 5 Wend., 170, 180.

⁶ 2 R. S. (5th ed.), 946, § 35.

⁷ Code Civ. Pro., § 1391.

the process, as where the officer goes beyond his jurisdiction or uses excessive force in making an arrest, or makes an excessive levy, or negligently permits property seized by him to be destroyed or squandered. Where the process under which the officer acts is valid on its face, it is a sufficient defense for all acts done in accordance to its directions, though he knows of facts rendering it void for want of jurisdiction.¹ Even if the judgment has been paid or has been extinguished by a discharge in bankruptcy, the officer holding a valid execution is protected.² For the justification of the officer acting under it, process need not be shown to have been returned. And the want of an indorsement on an execution of the time of its receipt by the officer, as the Code directs, does not affect its competency.³ The statute is directory merely, and the time of receiving it may be shown by parol.⁴

A sheriff holding an attachment has a right to seize personal chattels which have been disposed of by the debtor, with intent to defraud creditors; and when prosecuted by the claimant, he may show, before judgment in the attachment suit, that the title of the purchaser was fraudulent and void against the attaching creditor.⁵ But one who has a contract for a pledge, ineffectual for want of delivery of the goods, may obtain a subsequent delivery and thus validate the pledge, even as against an intermediate creditor. And an attachment of the thing pledged after such contract, and after possession by the pledgee thereunder, will not justify the sheriff in taking the goods from the possession of the pledgee.⁶ And where the owner of property consigns it to another, under an agreement that when paid for it shall become the property of the consignee, if the sheriff

¹ *People v. Warren*, 5 Hill, 440.

² *Ruckman v. Cowell*, 1 N. Y., 508; *McGuinty v. Herrick*, 5 Wend., 240; *Lewis v. Palmer*, 6 id., 367.

³ *Bealls v. Guernsey*, 8 Johns., 52; *Frost v. Shapleigh*, 7 Greenl., 236; see *Coburn v. Hopkins*, 4 Wend., 577; *Gardt v. Woodbridge*, 4 McLean (U. S.), 329.

⁴ *Rinchey v. Stryker*, 26 How. Pr., 75; S. C., 31 N. Y., 140; 28 id., 45; *Frost v. Mott*, 34 id., 253.

⁵ *Parshall v. Eggert*, 54 N. Y., 18.

take it on execution against the latter, with notice of the agreement, he is liable to the owner for the conversion.¹

A sheriff is not liable to trespass where he takes a wagon from the possession of a third party, who retakes it, and his servant fixes upon it a whiffletree belonging to such third party, without the knowledge of the officer who again takes the wagon.²

If a sheriff seizes and sells goods on execution unlawfully, he cannot set up, in mitigation of damages, a subsequent sale on another valid execution, since such a sale of property already once sold is not a fair sale.³ In Michigan it has been lately held that the fact that a person, whose goods were sold under a defective process against him, was present at the sale and made no objection, does not, as between him and the sheriff, preclude his bringing trover for wrongful conversion, if his silence did not mislead, and if there is no evidence that he knew of the defects in the process.⁴

Both the common law and the statute recognize the right of the master of a vessel, or the ship owner, to a lien for freight, expenses and charges, and for his liability upon outstanding bills of lading, and they are necessarily co-extensive with the value of the goods. Hence where goods have been shipped, and the bills of lading issued and outstanding, the sheriff cannot levy upon the goods under process against the shipper. A lien, in the nature of a special property, exists in favor of the master or ship owner to their full value. If the sheriff take the goods he is liable for their full value in an action of trespass or trover, by the ship owner or master. In such action, demurrage, too, may be allowed from the time of the seizure.⁵

A tender to a sheriff, by a judgment debtor, of the full amount collected upon an execution, in the hands of the former, discharges the lien of the execution upon property levied on by virtue thereof; and in case of a refusal to ac-

¹ *Cole v. Mann*, 62 N. Y., 1; but see *Deutsch v. Reilly*, 57 How. Pr., 75; S. C., 8 Daly, 132.

² *Parker v. Walrod*, 16 Wend., 514.

³ *Parker v. Conner*, 44 N. Y. Supr. Ct., 416.

⁴ *Bringard v. Stellwagen*, 41 Mich., 54.

⁵ *Campbell v. Conner*, 70 N. Y., 424.

cept the tender, and a subsequent sale of the property under the execution, an action for conversion will lie.¹

The power of the sheriff, for the purpose of rendering the levy upon the interest of one partner in the co-partnership property effectual, to take possession of the whole property, is merely incidental to the right to reach the debtor's interest, and is to be exercised as far as possible in harmony with, not in hostility to, the rights of the other partners. When, therefore, the sheriff exceeds this limit, and instead of levying on the debtor's interest, levies upon and seizes the property as the sole property of the debtor, he is a trespasser.²

Where a claim is made against a sheriff for money in his hands, and there is any doubt as to who is entitled to it, it is usual for the court, for the protection of the officer, to refuse to compel him to decide the controversy at his own risk.³

Where the existence of a judgment and the issuing of an execution thereon are admitted, the sheriff is protected in enforcing the same, and will not be called upon to decide to whom the judgment belonged, or what were the relative rights of the parties claiming the same.⁴

Rights of Sheriff as to Matters of Practice in Actions Against Him.—A sheriff may, under section 983 of the Code of Civil Procedure, have the place of trial of an action against him changed to his own county, though others are joined as parties defendant and no personal claim is made against him.⁵

A sheriff sued for an act done by him in the execution of process is entitled to take upon himself the conduct of the defense, and to retain such attorney as he sees fit, notwithstanding he was indemnified by the party suing out the process;⁶ unless the bond of indemnity provides that the

¹ *Tiffany v. St. John*, 65 N. Y., 314.

² *Atkins v. Saxton*, 77 N. Y., 195; *Waddell v. Cook*, 2 Hill, 47; *Smith v. Acker*, 23 Wend., 653.

³ *Mills v. Davis*, 53 N. Y., 349.

⁴ *Bovee v. King*, 11 Hun, 250.

⁵ *Wintjen v. Verges*, 10 Hun, 576; *People v. Kingsley*, 8 Hun, 233; *Abrahams v. Bensen*, 76 N. Y., 629.

⁶ *Peck v. Acker*, 20 Wend., 605; *People v. Hayes*, 7 How. Pr., 248.

sheriff shall notify the indemnitors of the suit and give them an opportunity to defend it. In the latter case, if the sheriff fail to give such notice, or having given the notice, refuse to let the indemnitors defend by their own attorney he cannot recover on the bond ;¹ nor can he recover on an implied promise to repay him the money he was compelled to pay, because of the execution of the process in the manner requested by them.²

What Actions Survive Death of Sheriff.—Actions against the sheriff for wrongs to property, rights or interests of another, such as trespass or trover, may be continued and maintained against the executors or administrators of the sheriff, when they are not brought for assault and battery, false imprisonment, or on the case for injuries to the person of the plaintiff, or of the testator or intestate of plaintiff ;³ except that an action for a chattel, formerly styled replevin, will not survive the death of the defendant.⁴ Although an action, in the nature of replevin, will not survive the death of the defendant, an action sounding in damages only, and in which the judgment, when recovered against an executor or administrator, is to be paid out of the estate in due course of administration, does survive, and may be continued against defendant's representative.⁵ Even an action on the case for a personal injury will not abate by the death of the defendant after verdict, report or decision.⁶

Costs.—Costs in actions, or special proceedings instituted by State writs, against sheriffs, or their deputies, for the recovery of damages, or chattels, for any act done by such officer under color of statute authority, or for an omission of a duty imposed by law, where the defendant has final judgment in his favor, shall be taxed at one and one-half

¹ Preston v. Yates, 17 Hun, 92.

² Preston v. Yates, 24 Hun, 534.

³ Bond v. Smith, 4 Hun, 48; Bank of California v. Collins, 5 id., 209; Heinmuller v. Gray, 13 Abb. N. S., 299; 3 R. S. (7th ed.), 2307, §§ 1, 5 and 6; id., 2394, § 1; id., 2395, § 2.

⁴ Hopkins v. Adams, 5 Abb. Pr., 351; Potter v. Van Vranken, 36 N. Y., 619; Lahey v. Brady, 1 Daly, 443.

⁵ Hopkins v. Adams, 5 Abb. Pr., 351; 3 R. S. (7th ed.), 2307, §§ 1, 5 and 6; id., 2394, § 1; id., 2395, § 2; 3 R. S. (5th ed.), 739, § 98; id., 746, § 1; Dininney v. Fay, 38 Barb., 18.

⁶ Code Civ. Pro., § 764.

times the costs prescribed by section 3251 of the Code of Civil Procedure, unless the officer unites in his answer with a defendant not entitled to such additional costs.¹ This provision covers nothing but actual costs. It does not cover disbursements.²

¹ Code Civ. Pro., § 3258.

² Code Civ. Pro., § 3259.

CHAPTER VII.

OF SHERIFF'S FEES.

1. *At Common Law.*

At common law the sheriff was bound to perform his duty gratuitously; and if he is entitled to charge anything at all, he must show his title under some legislative provision.¹ It is even questioned whether, when expenses are incurred by the sheriff, at the request of and upon the promise to repay of one of the parties, and for his benefit and convenience, he can recover the same of such party.² There is not a close analogy between the relation of a sheriff to the public, and still less between that of a sheriff to an execution debtor, and that of a servant to his master. The execution debtor is subject unto the sheriff, and is proceeded against *in invitum*. The right of a sheriff is *positivi juris*, not in the nature of a claim for work and labor; hence, where the law has imposed a duty upon him, he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right.³

2. *Fees as Provided by the Statutes.*

Code of Civil Procedure, Section 3307.—A sheriff is entitled, for the services herein specified, to the following fees:

1. *For serving a summons*, with or without either a copy of the complaint, or a notice specified in section 419, or section 423, of the Code of Civil Procedure; or for serving or executing an order of arrest, or any other mandate, for the

¹ Dew v. Parsons, 1 Chitty, 295; 18 E. C. L., 87; Campbell v. Cothran, 56 N. Y., 279.

² Crofut v. Brandt, 58 N. Y., 106. But see McKeon v. Horsfall, 13 Week. Dig., 252; Murtagh v. Conner, 15 Hun, 488; Griffin v. Helmbold, 72 N. Y., 437.

³ Comyns Digest, title — *Viscount, F.*, 1.

service or execution of which no other fee is specially prescribed by law, except a subpœna, one dollar for each person served, or as to whom it is executed ; and for necessary traveling to serve or execute the same, six cents for each mile traveled, going and returning ; the traveling fees to be computed from the court house of the county ; or, if there are two or more court houses, from that nearest to the place of service or execution. But where two or more mandates are delivered to a sheriff to be served upon, or executed against, one person, at one time, in one action or special proceeding ; or where a mandate is served upon or executed against two or more persons, in one action or special proceeding, and in the course of one journey ; the sheriff is entitled, in all, to six cents only, for each mile traveled.¹

2. *For levying a warrant of attachment*, against the property of a defendant, issued as prescribed in title three of chapter seven of the Code of Civil Procedure, or *for executing a requisition to replevy* one or more chattels, one dollar ; and, also, such additional compensation, for his trouble and expenses, in taking possession of and preserving the property, as the judge, issuing the warrant, or in case of a replevin, as the court or a judge thereof allows.

For making and filing a description of real property, or an inventory of personal property attached, twenty-five cents for each folio ; for each necessary copy thereof, twelve cents for each folio ; together with such compensation to the appraisers as the judge issuing the warrant allows, not exceeding two dollars to each appraiser, for each day actually employed.

For advertising, during the pendency of the action, personal property attached, the same fees as are allowed to a sheriff for advertising personal property for sale, by virtue of an execution. If the action is settled, either before or after judgment, the sheriff is entitled to poundage, upon the value of the property attached, not exceeding the sum at which the settlement is made.²

3. *For a copy necessarily made* by him, of a summons or other mandate, or of a complaint, affidavit, or other paper

¹ Code Civ. Pro., § 3307, subd. 1.

² Code Civ. Pro., § 3307, subd. 2.

served by him, where no fee is specially prescribed by law, twelve cents for each folio.¹

4. *For notifying jurors to attend a trial term* of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar, for trial by a jury, until the fee above specified is paid to him for the use of the sheriff. And where the cause is tried at a subsequent term without a new note of issue, as prescribed in section 977 of the Code of Civil Procedure, the party moving the trial must pay to the clerk, for the use of the sheriff, the calendar fee or fees remaining unpaid.² A county clerk will not be compelled to place a cause for trial on the calendar unless the sheriff's calendar fee is paid or tendered him.³ The sheriff is entitled to three term fees since the Code of Civil Procedure took effect, although he had previously received three term fees.⁴

5. *For notifying jurors drawn to attend upon a writ of inquiry*, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment, or an execution, or in obedience to a precept, issued by commissioners appointed to inquire concerning the incompetency of a person to manage himself or his affairs, in consequence of idiocy, lunacy or habitual drunkenness, or in any case not provided for in the "last preceding subdivision of this section," including the making and return of the inquisition when required, for each juror notified, twenty-five cents. For attending a jury when required, in such a case, two dollars.⁵

6. *For receiving an execution against property*, entering it in his books, searching for property, and postage on the return, when made through the post-office, fifty cents. If required by the sheriff, that fee, together with his fee for returning the execution, must be paid, by the person in whose behalf the execution is issued, at the time when it is

¹ Code Civ. Pro., § 3307, subd. 3.

² Code Civ. Pro., § 3307, subd. 4.

³ Little v. Coyle, 60 How. Pr., 76; S. C., 3 Month. Law Bull., 14.

⁴ Little v. Coyle, 60 How. Pr., 76; S. C., 3 Month. Law Bull., 14.

⁵ Code Civ. Pro., § 3307, subd. 5.

delivered to the sheriff, who is not bound to execute it unless the fee is so paid. For mileage upon an execution, for each mile, going only, ten cents; "to be computed as prescribed in subdivision first of this section."¹

7. *For collecting money by virtue of an execution*, a warrant of attachment, or an attachment for the payment of money in an action or special proceeding; or by virtue of a warrant for the collection of money, issued by the comptroller, or by a county treasurer; in any county except New York, Kings or Westchester, three per centum upon the sum collected, not exceeding \$250, and two per centum upon the residue of the sum collected, and in either of the counties of New York, Kings or Westchester, two and one half per centum upon the sum collected, not exceeding \$250, and one and one-quarter per centum upon the residue of the sum collected; and, also, where an execution is stayed after a levy, by order of the court or otherwise, or where a levy is upon a live animal, or speedily perishable property, such additional compensation, for his trouble and expense in taking care of and preserving the property, as the court or a judge thereof allows. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made, and to the additional compensation for his trouble and expense, if any, above provided for.² The sum to be allowed for "trouble and expense" is in the discretion of the court, and an order fixing it will not be reviewed by the Court of Appeals. The judge, or the court, may determine the matter on affidavits; where the facts are disputed, a reference *may* be ordered to determine them.³ The general term, however, will review the order of the court or judge below, and it may make such order as in the premises should have been made below.⁴

If after levy made under an execution, the judgment is

¹ Code Civ. Pro., § 3307, subd. 6.

² Code Civ. Pro., § 3307, subd. 7.

³ *German Am. Bank v. Morris Run Coal Co.*, 74 N. Y., 58; dismissing appeal S. C., 9 Hun, 205.

⁴ *Griffin v. Helmbold*, 72 N. Y., 437.

modified or reversed, the sheriff is entitled to fees only on the sum actually collected.¹

Where a transcript of a judgment of the marine court of the city of New York is filed in the county clerk's office, and an execution thereon issued to the sheriff, it is to be deemed a judgment of the court of common pleas; and the sheriff is not entitled to charge poundage as allowed upon execution from the marine court, but is restricted to his statutory allowances.²

The poundage and fees allowed by statute to a sheriff upon an execution are in full compensation for his services and expenses in executing the writ. He is not entitled to charge for keeping and watching the property levied on (except in case of a stay, or where the levy is upon a live animal, or speedily perishable property),³ for boxing and removing the same, for storage, for cataloguing or other preparations for sale, or for auctioneer's fees; nor can he charge for premiums paid for insurance, or for expenses by reason of an adverse claim to the property.⁴ Where, however, on consent of the parties, the court directs the employment of an auctioneer, the sheriff may charge as an expense the *legal* fees, and no more, of such auctioneer.⁵ A sheriff is entitled to his fees on all executions in his hands which were made, or, but for settlement between the parties, might have been made out of the property levied on.⁶ Even though executions be issued upon several judgments between the same parties and for the same original debt.⁷ Although the debtor have real property, unless there be proceedings commenced to sell the same on the execution, the sheriff is not entitled to poundage if the execution be settled without a levy on personal property.⁸ If the plaintiff direct a levy on specific property, and afterwards direct it to be re-

¹ *Campbell v. Cothran*, 56 N. Y., 279.

² *Crofut v. Brandt*, 58 N. Y., 106. In this case the authorities as to fees, chargeable by a sheriff, are collated.

³ Code Civ. Pro., § 3307, subd. 7.

⁴ *Crofut v. Brandt*, 58 N. Y., 106; *Lord v. Richmond*, 38 How. Pr., 173; *Townsend v. Ross*, 45 N. Y. Super. Ct., 447.

⁵ *Griffin v. Helmbold*, 72 N. Y., 437.

⁶ *Knickerbacker v. Shipherd*, 3 Cow., 383.

⁷ *Scott v. Shaw*, 13 Johns., 378.

⁸ *People v. Adams*, 1 Code R. (N. S.), 226.

leased, he is liable to the sheriff for his poundage.¹ And where executions are issued and levied in several counties, each sheriff is entitled to his poundage from the plaintiff, but only one set of fees can be collected of the execution debtor.²

8. *For advertising real or personal property for sale by virtue of an execution, warrant of attachment or other warrant specified in subdivision seven of the Code of Civil Procedure, section 3307, two dollars, unless it is stayed or settled before sale, and, in that case, one dollar.*³

9. *For making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio.*

For drawing and executing a conveyance upon a sale of real property, two dollars, to be paid by the grantee.

*The sheriff is also entitled to the printer's fees, as prescribed by law, paid by him for the publication, not more than six weeks, of the notice of the sale of real property, and he may require the party directing the sale to advance the printer's fees, in which case he must repay the same out of the proceeds. Where the notice is published more than six weeks, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, must be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff when the property is first advertised, the sheriff is entitled to printer's fees upon only one execution, and he must elect upon which execution he will receive the same.*⁴ The printer's fees are seventy-five cents for the first insertion, and fifty cents for each subsequent insertion, for each folio.⁵

If, after the advertisement for the sale of real estate on execution has commenced, the execution debtor procures and serves an injunction restraining the sale, all proceeding thereon, "except to adjourn the sale from time to time as they may be advised, until the determination of the ac-

¹ Crocker on Sheriffs, 488, § 1162 (2d ed.).

² Bolton v. Lawrence, 9 Wend., 435.

[³ Code Civ. Pro., § 3307, subd. 8.

⁴ Code Civ. Pro., § 3307, subd. 9.

⁵ Code Civ. Pro., § 3317.

tion or the further order of the court," it amounts to a request by him for the postponement, and he is liable to pay to the sheriff the expense of publishing the notice of postponement.¹

10. *For returning any mandate*, which he is required by law to return, twelve cents.

For a certified copy of an execution, and of the return of satisfaction thereupon, delivered to the person making the payment of the execution, twenty-five cents.²

11. *For posting and publishing the notice of sale, selling and conveying real property*, in pursuance of a direction contained in a judgment, the like fees as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars.³

12. *For taking a bond for the liberties of the jail*, one dollar.

For taking any other bond or any undertaking, which he is authorized to take, fifty cents.

For a certified copy of such a bond or undertaking, twenty-five cents.⁴

13. *For executing any mandate, requiring him to put a person in possession of real property*, other than a warrant to remove any person from lands belonging to the people of the State, or to Indians, and removing the person in possession, one dollar and fifty cents, and the same travel fees as upon the service of a summons.⁵

14. *For each person committed to or discharged from prison*, in an action or a special proceeding, one dollar, to be paid by the person at whose instance he is imprisoned.

For attending before an officer for the purpose of surrendering a prisoner, or receiving into custody a prisoner surrendered, in exoneration of his bail, including all his services upon such a surrender or receipt, one dollar.⁶

¹ Van Gelder v. Van Gelder, 26 Hun, 356, Smith v. Martin, 18 Wend., 590.

² Code Civ. Pro., § 3307, subd. 10.

³ Code Civ. Pro., § 3307, subd. 11.

⁴ Code Civ. Pro., § 3307, subd. 12.

⁵ Code Civ. Pro., § 3307, subd. 13.

⁶ Code Civ. Pro., § 3307, subd. 14.

Upon the arrest under a body execution, the judgment is satisfied so long as the defendant continues in custody under the arrest, and the sheriff is entitled to his poundage on the execution, whenever the defendant is discharged by the payment of the judgment, or under the act for the relief of debtors, or by the consent of the plaintiff.¹ And though the plaintiff consent to his discharge, the judgment debtor is not entitled thereto, until he or the plaintiff shall have paid the poundage and other fees to which the sheriff is by law entitled.² As the sheriff has incurred the risk of an escape, he is entitled to his poundage where one taken on execution is discharged, on the ground that no previous execution against property had been issued.³ But he is not entitled to fees for the arrest of one exempt from arrest, or where the arrest for any reason is absolutely void.⁴

15. *For attending a view*, two dollars for each day, and or traveling, going and returning, eight cents for each mile.⁵

16. *For bringing up a prisoner, upon a writ of habeas corpus, to inquire into the cause of detention*, one dollar and fifty cents; and for traveling to and from the jail, twelve cents for each mile.

For bringing up a prisoner, upon any other writ of habeas corpus, the same fees; and for attending the court or judge thereupon, one dollar for each day. The sheriff is entitled, further, upon any writ of *habeas corpus*, to his actual and necessary expenses.⁶

17. *For any services, which may be rendered by a constable*, other than those specially provided for in section 3307 of the Code, the same fees as are allowed by law to a constable for those services.⁷

The authority to raise the power of the county to assist

¹ *Adams v. Hopkins*, 5 Johns., 252; *Scott v. Shaw*, 13 id., 378; *Campbell v. Cothran*, 56 N. Y., 279; *Cooper v. Bigelow*, 1 Cow., 56; *Chapman v. Hatt*, 11 Wend., 41; *Koenig v. Steckel*, 58 N. Y., 475; *Ryle v. Falk*, 24 Hun, 255.

² *Ryle v. Falk*, 24 Hun, 255; S. C., 60 How. Pr., 516; S. C., *aff'd* on opinion of Davis, J., at Gen'l Term, 86 N. Y., 641.

³ *Scott v. Shaw*, 13 Johns., 378.

⁴ *Wragg v. Swart*, 10 Johns., 93.

⁵ Code Civ. Pro., § 3307, subd. 15.

⁶ Code Civ. Pro., § 3307, subd. 16.

⁷ Code Civ. Pro., § 3307, subd. 17.

him in overcoming resistance to process is now given to the sheriff only. And any constable may require the sheriff of his county, in case he fears resistance to a mandate of a justice of the peace given him to serve, to take the mandate and make the service himself.¹ Hence the sheriff may, in a certain contingency, be required to render any service which a constable may render. For the fees of constables in any particular case, see *post*, part three, chapter V.

18. *For executing a warrant, to remove any person from lands belonging to the people of the State, or to Indians*, such a sum as the comptroller audits and certifies to be a reasonable compensation.²

19. *For giving notice of any general or special election to all the officers*, to whom he is required by law to give such a notice, one dollar for each town or ward, in addition to the expense of publishing the notices, as required by law, payable from the county treasury.³

20. *For notifying constables to attend a court*, fifty cents for each constable notified.⁴

21. *For attending a term of a court, which he is required by law to attend*, for each day, three dollars.⁵

The provisions of section 3307 of the Code, except the limitation of amount contained in subdivision eleven thereof does not affect any special statutory provision, remaining unrepealed, relating to the fees and expenses of the sheriff of the city and county of New York, or the sheriff of the county of Kings.⁶

Special statutory provisions for the city and county of New York.—*In case of sales on foreclosure*, the sheriff shall be entitled to receive the following fees, and no more :

For receiving order of sale and posting notices of sale, ten dollars ; *for attending sale*, ten dollars ; *for drawing each deed of premises sold*, five dollars ; *for attending and adjourning a sale*, at the request of the plaintiff in the action, or by order of the court, three dollars, but no more than three such adjournments in one action shall be charged for ; *for making report of sale*, five dollars ; *for paying over surplus moneys*, three dollars.

¹ Code Civ. Pro., § 3158, *ante*, p. 191.

² Code Civ. Pro., § 3307, subd. 18.

³ Code Civ. Pro., § 3307, subd. 19.

⁴ Code Civ. Pro., § 3307, subd. 20.

⁵ Code Civ. Pro., § 3307, subd. 21.

⁶ Code Civ. Pro., § 3308.

And all disbursements made by him for printers' fees at the rate allowed by law therefor, fees of officers for taking acknowledgments and administering oaths, and all auctioneer's fees actually paid by him, but not to exceed for such auctioneer's fees twelve dollars for each parcel separately sold, which auctioneer's fees shall be paid by the purchaser of the parcel in addition to the amount bid by him therefor.¹

It shall be the duty of the clerk of every court for which a panel of grand jurors shall be summoned by the sheriff of the city and county of New York, to notify the supervisors of every case in which less than a majority of the persons named in the panel shall be returned as personally served, and the supervisors are prohibited from allowing or paying any fees or charges to the sheriff for serving any of the persons named in a panel in relation to which they shall be so notified, or for making any return thereto.²

Special Statutory Provision for Kings County.—This provision for the fees of sheriff on foreclosure sale is the same as that given above for New York county, except that the number of adjournments which may be charged for is not limited, and the disbursement for auctioneer's fees are those only which are paid to *licensed* auctioneers, and are limited to ten dollars for each parcel sold separately.³

Deputy Sheriff Attending Courts.—A deputy sheriff is entitled, for attending a sitting of a court of record, pursuant to a notice from the sheriff, to two dollars for each day's actual attendance in any county in the State, except Kings and New York, and mileage as allowed by law to trial jurors in courts of record. These fees must be paid by the county treasurer, upon the production of the certificate of the clerk, stating the number of days that the "constable" attended.⁴ But there is no provision requiring or authorizing

¹ Laws of 1869, chap. 569, § 2, as amended by Laws of 1874, chap. 192; see Code of Civ. Pro., § 3307, subd. 11; *Schermerhorn v. Prouty*, 80 N. Y., 317. N. Y. City Consol. Act of 1882, § 1088.

² Laws of 1853, chap. 498, § 9, as amended by Laws of 1877, chap. 417; 3 R. S. (7th ed.), 2562, § 9.

³ Laws of 1876, chap. 439, § 2; 3 R. S. (7th ed.), 2468, § 2; see *Kerrigan v. Force*, 68 N. Y., 381.

⁴ Code Civ. Pro., 3312, as amended in 1881 (chap. 122). The Code provision

sheriffs to notify their deputies to attend a sitting of court. A general deputy may attend for his principal. But in that case the sheriff would be entitled to three dollars *per diem*, though the services are rendered by a deputy.¹

Fees of Sheriffs for State Services.—Whenever a sheriff shall be required, by any statutory provision, to perform any service in behalf of the people of this State, and for their benefit, which shall not be made chargeable by law to his county, or to some officer or other person, his account for such services shall be audited by the comptroller, and be paid out of the treasury.²

Transportation of Convicts.—The rate of compensation to sheriffs for conveying one convict to a State prison or penitentiary, from the county prison, for each mile actually traveled, is twenty cents; for conveying two convicts, for each mile so traveled, thirty-five cents; for conveying three convicts, for each mile so traveled, forty cents; and for conveying four or more convicts, for each mile so traveled, twelve cents each; with one dollar per day for the maintenance of each convict while on the way to a State prison or penitentiary, but not exceeding one dollar for every thirty miles of travel, in full of all charges and expenses in the premises.³ All the convicts who shall be sentenced to imprisonment in the same State prison, or to the same house of refuge, at one session of a criminal court, shall be transported at the same time, unless said court shall expressly direct otherwise,⁴ except that this statute does not apply to the transportation of convicts from the city of New York to the house of refuge for juvenile delinquents.⁵

Transportation of Juvenile Delinquents and Insane Criminals.—The boards of supervisors in the respective counties of this State are hereby empowered, and it shall be their duty annually to fix and determine the compensa-

was for constables originally whom the sheriff was required by § 97 to notify to attend. In 1881 deputy sheriffs were included in § 3312, but not in § 97.

¹ Code Civ. Pro., § 97; *Day v. Mayor*, 66 N. Y., 592.

² 1 R. S. (5th ed.), 878, § 171; *id.* (6th ed.), 907, § 236; 2 *id.* (7th ed.), 967, § 76.

³ Laws of 1877, chap. 128, § 1.

⁴ Laws of 1847, chap. 497, § 5; 3 R. S. (7th ed.), 2583, § 5.

⁵ Laws of 1847, chap. 497, § 6; 3 R. S. (7th ed.), 2583, § 6.

tion to be allowed and paid to officers, for the conveyance of juvenile delinquents to the houses of refuge, and of lunatics to the insane asylums, and no other or greater amount than that so fixed and determined shall be allowed and paid for such service.¹

Sheriff's Fees in Criminal Cases.—The fees to sheriffs for every person committed to prison, are thirty-seven and a half cents; for every prisoner discharged from prison, thirty-seven and a half cents; for summoning a grand jury for a Court of Oyer and Terminer or general sessions, ten dollars; for serving a warrant, or performing any other duty which may be performed by a constable, the same fees as are allowed by law to a constable for such service.²

On County Treasurer's Warrants.—The sheriff shall be entitled to the same fees upon a county treasurer's warrant to collect tax out of personal property,³ or upon such officer's warrant against a defaulting collector,⁴ as upon executions out of the Supreme Court.

On Attachments Against Vessels.—The sheriff shall be entitled, in proceedings under the act of 1862 (chapter 482, of Liens on Vessels), to the following fees and expenses: For serving warrant, one dollar; for returning the same, one dollar; for the expenses of keeping the vessel in custody, the necessary sums paid by him therefor, not exceeding, however, the sum of two dollars and fifty cents for each day the vessel shall have been held by him in custody. Such sheriff shall not be entitled to receive any other or greater sums than those above specified, for any service rendered by him in any proceeding under said act, nor shall he be allowed expense of custody upon more than one warrant at the same time. All costs, disbursements and fees shall be verified by affidavit, and adjusted by the officer who issued the warrant.⁵

Fees Under Military Code.—Each officer, to whom a warrant for the collection of fines may be directed, shall be en-

¹ Laws of 1859, chap. 254, § 1; 3 R. S. (7th ed.), 2584.

² 3 R. S. (5th ed.), 1050, § 17; id. (6th ed.), 1053, § 22; id. (7th ed.), 2579, § 11; see Code Civ. Pro., § 3158, *post*, part 3, chap. V.

³ Laws of 1836, chap. 461; 2 R. S. (7th ed.), 1011.

⁴ Laws of 1862, chap. 194; 2 R. S. (7th ed.), 1014.

⁵ Laws of 1862, chap. 402, § 14; 3 id. (7th ed.), 2407, § 14; see *ante*, p. 493.

titled to the same fees, and be subject to the same penalty for any neglect, as are allowed and provided for executions issued out of justices' courts. For all other services and commitments, the sheriff, jailer and constables executing the same shall be entitled to the like fees as for similar services in civil cases.¹

Salvage as to Wrecks.—All sheriffs, coroners and wreck masters, and all persons employed by them, and all other persons aiding and assisting in the recovery and preservation of wrecked property, shall be entitled to a reasonable allowance as salvage, for their services, and to all expenses incurred by them in the performance of such services, out of the property saved, and the officer having the custody of such property shall detain the same, until such salvage and expenses shall be paid. The whole salvage that shall be claimed in any case shall not exceed one-half of the value of the property or proceeds on which such salvage shall be charged, and every agreement, order or adjustment, allowing a greater salvage, shall be void.²

Fees on Investigation as to Fires.—Except in the cities of New York, Buffalo and Brooklyn, the compensation of the officers holding the inquest, and their actual and necessary expenses, shall be fixed, audited and paid in the same manner as the compensation and actual and necessary expenses of coroners are now provided for by law.³

Disbursement for Oath, Postage, etc.—Where an officer or other person is required, in the course of a duty imposed upon him by law, to take an oath, to acknowledge an instrument, to cause an instrument to be filed or recorded, or to transmit a paper to another officer, he is entitled, in addition to the fees, or other compensation for the service, prescribed by law, to the fees necessarily paid by him, to the officer who administered the oath, or took the acknowledgment, or filed or recorded the instrument; and to the expense of transmitting the paper, including postage, where the transmission is lawfully made through the post-office.⁴

¹ Military Code, 203, subds. 2 and 3, as amended by chap. 547 of the Laws of 1880; 1 R. S. (7th ed.), 777, § 203; Laws of 1870, chap. 80, § 203; see *ante*, 509.

² See *ante*, p. 484; 2 R. S. (5th ed.), 962, §§ 12 and 13; *id.* (6th ed.), 980, §§ 12 and 13; 3 *id.* (7th ed.), 2081, §§ 12 and 13.

³ Laws of 1857, chap. 504, § 7; 3 R. S. (7th ed.), 2145, § 7; see *ante*, p. 482.

⁴ Code Civ. Pro., § 3291.

3. *Fees, How Paid and Collected.*

On Execution.—The fees of a sheriff, upon an execution against property, other than those with respect to which it is specially prescribed by statute, either that they must be paid by a particular person, or that they may be included in the costs of the party in whose favor the execution is issued, must be collected by virtue of the execution, in the same manner as the sum therein directed to be collected.¹ But where the sheriff is prevented from selling by the express directions of the plaintiff or his attorney, or where he is notified that the judgment is paid and satisfied, he has no right to sell for the purpose of collecting his fees.² He must look to the plaintiff or to his attorneys for his fees.

For Services Rendered the State.—Where the fees or other charges of an officer are chargeable to the State, they must be audited by the comptroller, and paid on his warrant, except as otherwise specially prescribed by law.³ So, for fees and expenses of sheriffs, criers, constables and police officers attending general terms.⁴ So, for services and expenses in transporting convicts to State prisons. And whenever any sheriff shall produce to the comptroller a statement of his account for such services and expenses, certified by the clerk or agent of the prison to which the convict was transported to be correct, and that there are no funds at such prison applicable to the payment thereof, it shall be the duty of the comptroller to draw his warrant on the treasurer in favor of such sheriff for the amount of his account.⁵ On the delivery of a convict or convicts to the keeper of a State prison, or to the superintendent of a house of refuge, the sheriff, or other person having charge of the same, shall make and render to the agent, keeper or clerk of the prison, or superintendent of the house of refuge, an account of the number of days spent in coming, and the estimated time necessary in returning home, and the amount

¹ Code Civ. Pro., § 3309.

² *Van Kirk v. Sedgwick*, 23 Hun, 37; S. C. aff'd, 87 N. Y., 265; *Craft v. Merrill*, 14 N. Y., 456; *Jackson v. Anderson*, 4 Wend., 474; *Bolton v. Lawrence*, 9 id., 435.

³ Code Civ. Pro., § 3295.

⁴ Laws of 1870, chap. 408; Code Civ. Pro., § 243.

⁵ Laws of 1840, chap. 25; 3 R. S. (7th ed.), 2582, 2583.

actually expended for the traveling expenses and sustenance of himself, his assistants and the convicts in charge, in coming to said prison or house of refuge, and the estimated like expenses in returning; which account shall then by him be certified on oath to be correct, and that the number of persons employed as assistants were, in his opinion, necessary for the safe keeping and delivery of such convicts, to which shall be added the certificate of either the agent, keeper or clerk of such prison, or superintendent of such house of refuge, setting forth the number of convicts so delivered, and the distance from such prison to the place of their conviction. The keeper of the respective prisons, and superintendents of the respective houses of refuge, are authorized to administer the oath above required. Such account, so certified and attested, shall be audited by the comptroller, and paid out of the treasury, unless otherwise provided.¹

For Services Rendered the County.—A sheriff, in whose county any convict shall be ordered by the court to be confined in the house of refuge, established by the Society for the Reformation of Juvenile Delinquents in the city of New York, shall be allowed the same compensation for removing such convict to such house of refuge, as is provided by law for the transportation of convicts to the State prison, to be audited and paid as part of the contingent expenses of the county.²

The fees, in criminal cases, of a sheriff, for every person committed to or discharged from the county prison, for summoning a grand jury, and for serving a warrant or performing any other duty which may be performed by a constable, are county charges, and shall be audited by the board of supervisors of the county in which such services are rendered, and shall be paid in the same manner as other contingent charges of the county.³ Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of inferior but wholesome food, at the

¹ Laws of 1847, chap. 497, §§ 3, 4; 3 R. S. (7th ed.), 2583, §§ 3, 4.

² 3 R. S. (5th ed.), 988, § 28; id. (6th ed.), 994, § 38; id. (7th ed.), 2538, § 18; Laws of 1859, chap. 254.

³ 3 R. S. (5th ed.), 1051, § 22; id. (6th ed.), 1054, § 29; id. (7th ed.), 2579, § 12.

expense of the county.¹ The moneys necessarily expended by any county officer, in executing the duties of his office, in cases in which no specific compensation for such services is provided by law, are chargeable to the county.² But no account shall be audited by any board of town auditors, or supervisors, or superintendents of the poor, for any services or disbursements, unless such account shall be made out in items, and accompanied with an affidavit attached to, and to be filed with such account, made by the person presenting or claiming the same, that the items of such account are correct, and that the disbursements and services charged therein have been in fact made or rendered, or necessary to be made or rendered at that session of the board, and stating that no part thereof has been paid or satisfied. And the chairman of such board, or either of such superintendents, is hereby authorized to administer the required oath.³ And the chairman of any committee appointed by the board of supervisors, to audit claims and accounts, may administer such oath.⁴ No travel fees shall be allowed for traveling to subpœna a witness, beyond the limits of the county in which the subpœna was issued, or of an adjoining county, unless the board auditing the account shall be satisfied by proof that such witness could not be subpœnaed without additional travel; nor shall any travel fees for subpœnaing witnesses be allowed, except such as the board auditing the account shall be satisfied were indispensably necessary.⁵ No board of supervisors shall allow any charge for serving any subpœna in any criminal case or proceeding, served on behalf of the defendant.⁶ And whenever a subpœna for witnesses in criminal cases or complaints, containing one or

¹ 3 R. S. (5th ed.), 1062, § 7; id. (6th ed.), 1064, § 8; id. (7th ed.), 2589, § 8; 1 id. (5th ed.), 902, § 3, subd. 6; id. (6th ed.), 927, § 3, subd. 6; 2 id. (7th ed.), 978, § 3, subd. 6; as to prisoners in civil cases, see Code Civ. Pro., §§ 110, 111, 112, *ante*, p. 235.

² 1 R. S. (5th ed.), 902, § 3, subd. 9; id. (6th ed.), 928, § 3, subd. 9; 2 id. (7th ed.), 979, § 3, subd. 9.

³ Laws of 1845, chap. 180, § 24; as amended by the Laws of 1847, chap. 490; 1 R. S. (7th ed.), 845, § 24; id. (5th ed.), 902, §§ 1, 2; id. (6th ed.), 927, §§ 1, 2; 2 id. (7th ed.), 978, §§ 1, 2.

⁴ Laws of 1836, chap. 506, § 3; 3 R. S. (7th ed.), 2580, § 3.

⁵ Laws of 1845, chap. 180, § 27; 1 R. S. (7th ed.), 846, § 27.

⁶ Laws of 1845, chap. 180, § 18; 3 R. S. (7th ed.), 2548, § 18.

more names, shall be served by a constable or other officer, such officer shall be allowed for mileage only for the distance, going and returning, actually traveled to make such service upon all the witnesses in such case of complaint, and not separate mileage for each witness, unless the board of supervisors, auditing accounts for such services, shall deem it equitable to make a further allowance.¹ Whenever it shall be necessary to send subpoenas into a foreign county for witnesses on criminal process, the district attorney may send them to the sheriff of the county in which the witnesses reside, whose duty it shall be to serve the same, and make his return without delay to such district attorney.²

The provision of the "act to reduce the number of town officers," etc. (Laws of 1845, chapter 180, section 26, as amended by section 13, chapter 455, Laws of 1847,) providing for the payment of the fees of magistrates and other officers for certain criminal proceedings by the towns or cities where the offense was committed, does not embrace the fees of a sheriff, as jailer or otherwise. Hence, a board of supervisors may be compelled to admit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city within the county, for misdemeanors and violations of city ordinances. In such case, however, the board of supervisors have power to fix the compensation of the sheriff.³

Sheriff of Ulster County.—The board of supervisors of Ulster county shall not audit, or allow to the sheriff of said county, more than the sum of \$6,000, in any year, for his services and expenses as such sheriff for said county.⁴

Fugitive from Justice.—When the governor of this State, in the exercise of the authority conferred by the constitution of the United States, or by the laws of this State, shall demand from the governor of any State or territory in the United States, or from the executive authority of any foreign government, any fugitive from justice, the accounts of the persons employed by him for that purpose, for their

¹ Laws of 1836, chap. 506, § 1; 3 R. S. (7th ed.), 2580, § 1.

² Laws of 1836, chap. 506, § 4; 3 R. S. (7th ed.), 2580, § 4.

³ *People ex rel. Van Tassel v. Board of Supervisors of Columbia Co.*, 67 N. Y., 330; reversing S. C., 8 Hun, 275.

⁴ Laws of 1879, chap. 255, § 2; 2 R. S. (7th ed.), 976, § 2.

services, shall be audited by the comptroller and paid out of the treasury.¹ A reasonable *per diem* compensation and actual necessary expenses are usually allowed.

When a fugitive from justice from another State is arrested within this State, all costs and expenses in the apprehending, securing and transmitting such fugitive to the State or territory making demand of him, shall be paid by such State or territory.²

The United States has the exclusive power to regulate, provide for, and control the surrender of fugitives from justice from foreign countries. The provisions, therefore, of the Revised Statutes (1 R. S., [5th ed.], 164, §§ 8-11; id. [7th ed.], 455, §§ 8-11), providing for such surrender, is unconstitutional, and a warrant issued by the governor in pursuance thereof is void.³

Taxation of Fees.—A sheriff or coroner, who, upon the collection of an execution, or the settlement, either before or after judgment, of an action or a special proceeding, claims any fees, which have not been taxed, must, upon the written demand of the person liable to pay the same, cause them to be taxed within the county, upon notice to the person making the demand, by a justice of the Supreme Court, a judge of a superior city court, or the county judge. After such a demand is made, the officer cannot collect his fees until they have been so taxed.⁴ A sheriff's fees cannot be taxed upon his demand, but only upon demand of the person liable to pay them.⁵ The sheriff may be required to tax even his actual disbursements, as auctioneer's fees;⁶ especially so when he is authorized to disburse only at a certain rate for a particular service.⁶

Penalties for excessive Fees, etc.—Every officer or other person who shall insert the names of witnesses in a subpoena issued for the people, intended for the prisoner, with intent thereby to deceive any person, or to obtain any pay

¹ 3 R. S. (5th ed.), 1043, § 52; id. (6th ed.), 1047, § 66; *Gregg v. Pierce*, 53 Barb., 587.

² U. S. Rev. Stat., § 5278.

³ *People ex rel. Barlow v. Curtis*, 50 N. Y., 321.

⁴ Code Civ. Pro., § 3287.

⁵ *Lynch v. Meyers*, 3 Daly, 256.

⁶ *Griffin v. Helmbold*, 72 N. Y., 437.

as for services in subpoenaing witnesses for the people, shall be deemed guilty of a misdemeanor.¹

Each public officer, upon whom a duty is expressly imposed by law, must execute the same without fee or reward, except where a fee or other compensation therefor is expressly allowed by law. An officer or other person, to whom a fee or other compensation is allowed by law, for any service, shall not charge or receive a greater fee or reward, for that service, than is so allowed.²

An officer, or other person, shall not demand or receive any fee or compensation, allowed to him by law for any service, unless the service was actually rendered by him, except that an officer may demand in advance his fee, where he is, by law, expressly directed or permitted to require payment thereof before rendering the service.³ Who does either of the acts thus, as above prohibited, is liable, in addition to the punishment prescribed by law for the criminal offense, to an action in behalf of the person aggrieved, in which the plaintiff is entitled to treble damages.⁴ The punishment for the criminal offense and various other provisions of the criminal law appertaining to the taking of excessive or prohibited fees have, in a former part of this work, been referred to.⁵

¹ Laws of 1845, chap. 180, § 18; 3 R. S. (7th ed.), 2548, § 18.

² Code Civ. Pro., § 3280.

³ Code Civ. Pro., § 3281.

⁴ Code Civ. Pro., § 3282.

⁵ See *ante*, p. 90, *et seq.*; Penal Code, §§ 48, 50, 51, 557.

PART II.

OF CORONERS.

CHAPTER I.

OF THEIR ELECTION, QUALIFICATION, RESIGNATION, AND REMOVAL.

SECTION I.

ELECTION AND QUALIFICATION.

Coroners, like sheriffs and county clerks, shall be chosen, by the electors of the respective counties, once in every three years, and as often as vacancies shall happen.¹ Four coroners are chosen for every county in the State.² These coroners are to be elected in the same manner, and at the same general election, as sheriffs, and hold their offices for the same term, and are removable in like manner.³ The sheriffs, clerks, and coroners first chosen in every county that may hereafter be erected, shall be elected at the general election next succeeding the erection of the county, or at such other time as the legislature shall direct.⁴ The county clerk must prepare as many certified copies of each certificate of the determination of the board of county canvassers, as there are persons declared to be elected in such certificate, and shall, without delay, deliver one of such copies to each person so elected.⁵

As in all elective offices, so in the office of coroner, the

¹ Const., art. ix, § 1.

² 1 R. S., 379, (5th ed.), § 1, subd. 3; id. (6th ed.), 379, § 1, subd. 3; id. (7th ed.), 339, § 1, subd. 3; N. Y. City Consolidation Act of 1882, § 1766.

³ 1 R. S. (5th ed.), 397, §§ 68, 69; id. (6th ed.), 423, §§ 68, 69; id. (7th ed.), 360, § 49; N. Y. City Consolidation Act of 1882, § 1766.

⁴ 1 R. S. (5th ed.), 401, § 89; id. (7th ed.), 360, § 50.

⁵ 1 R. S. (5th ed.), 439, § 21; id. (6th ed.), 444, § 21; id. (7th ed.), 392, § 21.

incumbent must be, at the time of his election or appointment thereto, a citizen of the State, of the age of twenty-one years or more, and a resident of the county in which the duties of his office are required by law to be executed. While he continues in office the coroner cannot practice as attorney or counselor in any court of the State.¹ But he is not prohibited, as is the sheriff, from holding his office for a succession of terms, nor from holding any other office, as well as that of coroner. On the first day of January, after having been elected, the coroner enters upon his duties; and he continues in the discharge thereof for the full term of three years, and until his successor is elected and has duly qualified.

Oath.—The coroner, before he enters upon the duties of his office, must take the customary oath. This oath must be taken, and subscribed and deposited in the office of the clerk of the county in which he resides, within fifteen days from the time of his notification of election, or appointment, to the office, or within fifteen days after the commencement of his term of office.² The oath may be taken and subscribed, except where otherwise provided, before any justice of the Supreme Court, any circuit judge, the secretary of state, the attorney-general, the lieutenant-governor, the president of the senate for the time being, the speaker of the house of assembly, any judge of any county court, the clerk of any county or city or of any court of record.³ If any person shall execute any of the duties, or functions, of any office, without having taken and subscribed the oath of office required by law, he shall forfeit the office to which he may have been elected, or appointed, and shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment.⁴ So far, however, as the rights of third persons, and of the public are concerned, his acts as such officer are valid, although he has not obeyed the statutory requirement and taken the oath.⁵

¹ Code Civ. Pro., § 62.

² 1 R. S. (5th ed.), 410, 411, §§ 24, 25; id. (6th ed.), 417, §§ 24, 25; id. 7th ed.), 367, 368, §§ 21, 24.

³ 1 R. S. (5th ed.), 410, § 22; id. (6th ed.), 417, § 26; id. (7th ed.), 367, § 22.

⁴ Penal Code, § 42; 1 R. S. (5th ed.), 412, § 36; id. (6th ed.), 418, § 35; id. (7th ed.), 369, § 31.

⁵ *People v. Hopson*, 1 Denio, 574.

SECTION II.

RESIGNATION AND REMOVAL.

The governor may remove the coroner, within the term for which he shall have been elected, giving to him a copy of the charges against him, and an opportunity of being heard in his defense.¹ He may also resign his office to the governor.² And in case he ceases to be an inhabitant of the county for which he is chosen, his office becomes vacant;³ it becomes vacant, too, on his neglect or refusal to take the oath of office within the required time;⁴ or on his conviction of an infamous crime, or of any offense involving the violation of his oath of office.⁵ If the county in which he is chosen a coroner is divided, in any way, he loses his office, unless his residence is in that part of the county which retains the old county name.

Forfeiture.—A sheriff, coroner, clerk of a court, constable or other ministerial officer, and every deputy or subordinate of any ministerial officer, who either :

1. Mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his office ; or,

2. Fraudulently appropriates to his own use, or to the use of another person, or secretes with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him in virtue of his office, is guilty of a felony.⁶ One convicted of a felony is punishable by imprisonment in a State prison for a specified period of time.⁷ And a sentence of imprisonment in a State prison forfeits any public

¹ Const., art. x, § 1, last sentence.

² 1 R. S. (5th ed.), 413, § 38, subd. 4; id. (6th ed.), 420, § 38, subd. 4; id. (7th ed.), 370, § 33, subd. 4.

³ 1 R. S. (5th ed.), 413, § 40, subd. 4; id. (6th ed.), 420, § 40, subd. 4; id. (7th ed.), 370, § 34, subd. 4.

⁴ 1 R. S. (5th ed.), 413, § 40, subd. 6; id. (6th ed.), 420, § 40, subd. 6; id. (7th ed.), 370, § 34, subd. 6.

⁵ 1 R. S. (5th ed.), 413, § 40, subd. 5; id. (6th ed.), 420, § 40, subd. 5; id. (7th ed.), 370, § 34, subd. 5.

⁶ Penal Code, § 114.

⁷ Penal Code, § 14.

office, *e. g.*, the office of coroner, which the convict may hold at the time.¹

A person who asks or receives, or agrees to receive, any gratuity or reward, or any promise thereof, for appointing another person, or procuring for another person an appointment, to a public office or to a clerkship, deputation or other subordinate position in such an office, is guilty of a misdemeanor. If the person so offending is a public officer, a conviction also forfeits his office.²

A public officer who, for any reward, consideration or gratuity, paid or agreed to be paid, directly or indirectly, grants to another the right or authority to discharge any functions of his office, or permits another to make appointments or perform any of his duties, is guilty of a misdemeanor, and a conviction for the same forfeits his office and disqualifies him forever from holding any office whatever under this State.³

A sheriff or other officer or person, who corruptly and wilfully allows a prisoner, lawfully in his custody, in any action or proceeding, civil or criminal, or in any prison under his charge or control, to escape or go at large, except as permitted by law, or connives at or assists such escape, is guilty of a felony;⁴ and, on conviction for the offense, he forfeits his office, and is forever disqualified to hold any office or place of trust, honor or profit, under the constitution or laws of this State.⁵

Vacancy, how Filled.—A vacancy in the office of coroner should be supplied at the general election next succeeding the happening thereof.⁶ If it shall not be so supplied, a special election to supply such vacancy shall then be held.⁷ In case a vacancy occurs in the office of coroner, because, at a general election, two or more candidates for the office had received the same number of votes, a special election shall be ordered by the board of canvassers having the power to

¹ Penal Code, § 707.

² Penal Code, § 53.

³ Penal Code, § 54.

⁴ Penal Code, § 89.

⁵ Penal Code, § 90.

⁶ 1 R. S. (5th ed.), 420, § 8; *id.* (6th ed.), 429, § 8; *id.* (7th ed.), 380, § 8.

⁷ 1 R. S. (5th ed.), 420, § 9; *id.* (6th ed.), 429, § 9; *id.* (7th ed.), 380, § 9.

determine on the election of the officer omitted to be chosen, and in all other cases such election shall be ordered by the governor, who shall issue his proclamation therefor. Such proclamation shall specify the county or district in which such special election is to be held, the cause of such election, the name of the officer in whose office the vacancy has occurred, the time when his term of office will expire, and the day on which such election is to be held, which shall not be less than twenty nor more than forty days from the date of the proclamation.¹ Whenever vacancies shall exist or shall occur in any of the offices of this State, where no provision is now made by law for filling the same (the office of coroner is one of these offices), the governor shall appoint some suitable person who may be eligible to the office so vacant, or to become vacant, to execute the duties thereof until the commencement of the political year next succeeding the first annual election after the happening of the vacancy at which such officer could be by law elected; and the person so appointed to fill such vacancy shall possess all the rights and powers, and be subject to all the liabilities, duties and obligations of such officer, as they now are or may hereafter be prescribed by law.² All officers who are or shall be appointed by the governor for a certain time, or to supply a vacancy, may be removed by him at pleasure, and another appointed in his stead.³

¹ 1 R. S. (5th ed.), 420, §§ 10, 11; id. (6th ed.), 429, §§ 10, 11; id. (7th ed.), 380, §§ 10, 11.

² Laws of 1849, chap. 28, and 1 R. S. (5th ed.), 414, § 51, as amended by Laws of 1867, chap. 335; 1 R. S. (7th ed.), 373.

³ 1 R. S. (5th ed.), 414, § 44; id. (6th ed.), 420, § 44; id. (7th ed.), 370, § 38; *People ex rel. Faxton v. Parker*, 6 Hill, 49.

CHAPTER II.

OF THEIR DUTIES AS SHERIFF, AND IN CERTAIN CASES AND SPECIAL PROCEEDINGS.

SECTION I.

OF THEIR DUTIES AS SHERIFF.

1. *Vacancy in Sheriff's Office.*

Designation of Coroner.—Whenever a vacancy shall occur in the office of sheriff of any county, and there shall be no under-sheriff of such county then in office, or the office of such under-sheriff shall become vacant, or he become incapable of executing the same, before another sheriff of the same county shall be elected or appointed, and qualified, and there shall be more than one coroner of such county then in office, it shall be the duty of the first judge of the county, forthwith to designate one of such coroners to execute the office of sheriff of the same county, until a sheriff thereof shall be elected or appointed, and qualified. Such designation shall be by instrument in writing, and shall be signed by the judge, and filed in the office of the clerk of the county, who shall immediately give notice thereof to the coroner.¹

Bond.—The coroner so designated, within six days after receiving such notice, shall execute, with sureties, a joint and several bond to the people of this State, which shall be in the same amount, and with the same number of sureties, and be approved of in the same manner, and be subject in all respects to the same regulations, as the security required by law from the sheriff of such county. And after the execution of such bond, the coroner so designated shall execute the office of sheriff of the same county, until a sheriff shall

¹ 1 R. S. (5th ed.), 878, § 173; id. (6th ed.), 907, § 238; id. (7th ed.), 967, § 78.

be duly elected or appointed, and qualified.¹ If the coroner so designated shall not, within the time above specified, give such security as is above required, it shall be the duty of the first judge to designate, in like manner, another coroner of the county, to assume the office of sheriff; and in case it shall be necessary so to do, the first judge shall proceed to make successive designations, until all the coroners of the county shall have been designated to assume such office. And all the preceding provisions, with reference to the original and subsequent designations, shall apply to every such designation, and to the coroner named therein.²

Powers and Duties of Sole Coroner.—Whenever any such vacancies shall occur in the offices both of sheriff and under-sheriff of any county, if there shall be but one coroner of such county then in office, such coroner shall be entitled to execute the office of sheriff of the same county, until a sheriff shall be duly elected or appointed, and qualified; but before he enters on the duties of such office, and within ten days after the happening of the vacancy in the office of the under-sheriff, he shall execute, with sureties, a joint and several bond to the people of this State, in the same amount, and with the same number of sureties, as may be required by law from the sheriff of such county; and such bond shall be subject, in all respects, to the same regulations as the security required from the sheriff.³ If such coroner, solely in office on the happening of such vacancies, shall neglect or refuse to execute such bond within the time required, it shall be the duty of the first judge of the county, in which such vacancies shall exist, to appoint some suitable person to execute the office of sheriff of the same county, until a sheriff shall be duly elected or appointed and qualified.⁴ Such appointment shall be in writing, under the hand and seal of the first judge, and shall be filed in the office of the county clerk, who shall forthwith give notice thereof to the person so appointed.⁵ The person so appointed shall, within six days after receiving notice of his

¹ 1 R. S. (5th ed.), 878, § 174; id. (6th ed.), 907, § 239; id. (7th ed.), 967, § 79.

² 1 R. S. (5th ed.), 879, § 175; id. (6th ed.), 907, § 240; id. (7th ed.), 967, § 80.

³ 1 R. S. (5th ed.), 879, § 176; id. (6th ed.), 907, § 241; id. (7th ed.), 968, § 81.

⁴ 1 R. S. (5th ed.), 879, § 177; id. (6th ed.), 908, § 242; id. (7th ed.), 968, § 82.

⁵ 1 R. S. (5th ed.), 879, § 178; id. (6th ed.), 908, § 243; id. (7th ed.), 908, § 83.

appointment, and before he enters on the duties of the office, give such security as may be required by law of the sheriff of such county, and subject to the same regulations; and, after such security shall have been duly given, such person shall execute the office of sheriff of the county, until a sheriff shall be duly elected or appointed and qualified.¹

Coroners to act until Designation.—Until some coroner designated, or some person appointed by the first judge, shall have executed the security above prescribed, or until a sheriff of the county shall have been duly elected or appointed and qualified, the coroner or coroners of the county in which such vacancies shall exist, shall execute the office of sheriff of the same county.² And whenever any undersheriff, coroner, coroners or other person, shall execute the office of sheriff, the person so executing such office shall be subject to all the duties, liabilities and penalties imposed by law upon a sheriff duly elected and qualified.³

When the office of sheriff has become vacant, the coroner becomes *ex officio* sheriff, and all the duties, rights and powers of the sheriff, including power to appoint a deputy for the performance of sheriff's duties, will devolve upon him until the vacancy is filled in some other legal mode; and the service of process by his deputy will be legal.⁴

2. When Sheriff a Party.

Power and Duty of a Coroner.—In an action or special proceeding, to which the sheriff of a county is a party, a coroner of the same county has all the power, and is subject to all the duties of a sheriff, in a cause to which the sheriff is not a party; except as otherwise specially prescribed by law.⁵

Mandate; how Directed.—A mandate in a civil action or special proceeding, which must or may be executed by the

¹ 1 R. S. (5th ed.), 879, § 179; id. (6th ed.), 908, § 244; id. (7th ed.), 968, § 84.

² 1 R. S. (5th ed.), 879, § 180; id. (6th ed.), 908, § 245; id. (7th ed.), 968, § 85.

³ 1 R. S. (5th ed.), 879, § 181; id. (6th ed.), 908, § 246; id. (7th ed.), 968, § 86.

⁴ Reed v. Reber, 63 Ill., 240; and see Yeargin v. Siler, 83 N. C., 348.

⁵ Code Civ. Pro., § 172.

coroners, or by a coroner of a county, must be directed either to a particular county, or generally to the coroners of that county. Where such a mandate is directed generally to the coroners of a county, or requires them to do any act, it may be executed, and a return thereto may be made and signed by one of them; but such an act or return does not affect the others.¹ Unless a mandate is directed as above required, the coroner to whom it is delivered has no authority to execute it, and is not liable for failure to return it.² Where the coroner has acted in service of process, the legal presumption is that the facts existed, which rendered it proper for him to act in the particular instance.³ Process directed to and executed by a *de facto* coroner is good.⁴ And whether or not a coroner has authority to commit to jail, a party charged with felony, it is too late to object to his authority, after a regular examination, and an indictment found for the felony.⁵ In a suit on a coroner's bond, proof that he had served and returned a writ, directed to him as coroner, was held to be sufficient evidence of his authority in the premises.⁶ A coroner may serve process on the sheriff when he is a party to the suit, though he is one of the sheriff's own deputies.⁷ And if a justice of the peace acts as a coroner, and commits a person to jail for a felony, he may certify the fact of such committal as a justice of the peace.⁸ The coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the sheriff is a party.⁹ When a sheriff is sued in a justice's court, the coroner need not

¹ Code Civ. Pro., § 173.

² *Brown v. Barker*, 10 Humph. (Tenn.), 346; *The Governor v. Lindsay*, 14 Ala., 658; *Gresham v. Leverett*, 10 Ala., 384.

³ *Kittridge v. Bancroft*, 1 Met. (Mass.), 508; *Kirk v. Murphy*, 16 Tex., 654; *Rodolph v. Mayer*, 1 Wash. Terr., 154; but see *Carlisle v. Weston*, 21 Pick., 535, which holds that the service of process by a coroner, being by virtue of a special authority, all the facts necessary to give him the power should appear in the writ itself; and see *Commonwealth v. Moore*, 19 Pick., 339.

⁴ *Gunby v. Welcher*, 20 Ga., 336; *Mabry v. Turrentine*, 8 Ired. (N. C.), 201.

⁵ *Wormely v. Commonwealth*, 10 Gratt. (Va.), 658.

⁶ *Young v. Commonwealth*, 6 Binn. (Penn.), 93.

⁷ *Colby v. Dillingham*, 7 Mass., 475.

⁸ *Wormely v. Commonwealth*, 10 Gratt. (Va.), 658.

⁹ Code Civ. Pro., §§ 104, 173; *Slater v. Wood*, 9 Bosw., 15.

serve the process. The statute only applies to process of the courts whereof the sheriff is an officer.¹

Service of Process by Deputy.—The service of process by a coroner in a case where the sheriff is interested is the discharge of a ministerial duty, merely; hence, the service may be made by a deputy appointed by the coroner.²

Arrest of Sheriff.—Where a mandate, requiring the arrest of the sheriff of the county, is directed to a coroner, he must execute the same in the manner prescribed by law, with respect to the execution of a similar mandate by a sheriff; and he is authorized to take an undertaking on the arrest, or a bond for the jail liberties, to himself, in his name of office, in a like case, and in like manner, and with like effect, as where such a bond or undertaking may be taken by a sheriff.³ On an attachment against the sheriff for not returning an execution, if the coroner returns that the sheriff is in his custody, by virtue of an execution against his body, the court will direct an *alias* attachment to issue and award a writ of *habeas corpus* to bring up the body of the sheriff.⁴

Confinement of Sheriff.—Where the actual confinement of a sheriff by a coroner, on a mandate, is required or authorized by law, he must be confined by the coroner, in a house situated within the liberties of the jail of the county, other than the sheriff's house, or the jail, in the same manner as a sheriff is required by law to confine a prisoner in the jail.⁵ That house thereupon becomes the jail of the county, for the use of the coroner; and each provision of law relating to the jail, or to an escape from the jail, applies thereto, while the sheriff is confined therein.⁶

Sheriff, Admitted to Jail Liberties.—A sheriff so arrested must be admitted to the liberties of the jail of the county, in a like case, and upon executing a like bond to the coroner, as prescribed by law for a prisoner in the sheriff's custody. For an escape of the sheriff from the liberties, the coroner is liable, in the same manner, and to the same

¹ Cron v. Krones, 17 Wis., 401.

² Yeargin v. Siler, 83 N. C., 348; Jewell v. Hutchinson, 2 Vroom. (N. J.), 71.

³ Code Civ. Pro., § 174.

⁴ Anon., 22 Wend., 635.

⁵ Code Civ. Pro., § 175; and see Day v. Brett, 6 Johns., 22.

⁶ Code Civ. Pro., § 176.

extent, as a sheriff for a similar escape; and he may make the same defense as a sheriff.¹ The coroner may prosecute a bond for the liberties taken by him, and is entitled to all the rights, and subject to all the liabilities, prescribed by law, with respect to a similar bond taken by a sheriff. The bond may be assigned by him, to the party at whose instance the sheriff was arrested; and the same proceedings may be had thereupon, as upon a bond taken and assigned by a sheriff, in a similar case.²

Arrest of Person at Instance of Sheriff.—A person arrested by a coroner, in an action or special proceeding, in which the sheriff of the county is plaintiff, must be confined in the jail of the county, in a case where such a confinement is required or authorized by law; but the coroner is not liable for an escape of the prisoner from the jail, after he has been confined therein. A person so confined must be kept and treated, in all respects, like a prisoner confined by the sheriff.³

A person so arrested by a coroner, is entitled to be discharged, or to the liberties of the jail, as the case requires, upon giving a bond or an undertaking to the coroner, in the like manner, and in a like case, in which a person arrested by a sheriff would be entitled to be so discharged, or to the liberties. The bond or undertaking so given must be, in all respects, similar to that required to be given to a sheriff; and it has the like effect, and may be assigned and proceeded upon in like manner.⁴

A coroner is answerable for an escape of a prisoner, admitted by him to the liberties of the jail, in the same manner and to the same extent, as a sheriff, and may interpose a like defense.⁵

A coroner has no jail, and can commit only to the county jail, except where the sheriff himself is the party arrested: so, where a coroner arrests a deputy jailer on execution, and carries him to the jail, and neither the sheriff, nor any keeper appointed by the sheriff is there to receive and confine him, the coroner has done his duty, and if the prisoner

¹ Code Civ. Pro., § 177; *ante*, pp. 546, 557, 561.

² Code Civ. Pro., § 178; *ante*, p. 546, *et seq.*

³ Code Civ. Pro., § 179; *ante*, pp. 34, 166.

⁴ Code Civ. Pro., § 180; *ante*, p. 541, *et seq.*

⁵ Code Civ. Pro., § 181; *ante*, p. 550, *et seq.*

afterwards go at large, it is the escape of the sheriff.¹ And it may be stated generally, that when an arrest is made by a coroner of a person other than the sheriff, the confinement of the party arrested must be in the jail of the county. The sheriff is excepted, because both by statute and at common law, he has the custody of the jail; hence, to confine him in his jail would be, virtually, to permit him to go at large.²

Protection Afforded by Process.—When process is in the hands of the coroner, commanding him to seize property in the hands of the sheriff, which is regular on its face, he need not look behind it to inquire whether the prerequisite steps have been taken; he stands in a like position as a sheriff in a like case, and is protected by his process in taking the property specified from the possession of the defendant named.³

Service of Papers Upon Coroner when Sheriff a Party.—The provisions of the Revised Statutes,⁴ providing for service of papers upon a sheriff by leaving the same at his office, or delivering them to any person therein belonging to the office, apply to coroners when acting in the place of the sheriff, in an action wherein the sheriff is a party.⁵

Undertaking Taken by Coroner, When Void.—When the sheriff seeks to exonerate himself from liability, as bail, by surrendering the defendant, he must rearrest him and surrender him to the custody of the jail. He cannot surrender him to the coroner; and the coroner has no right to receive him or to detain him in custody. There is no order of arrest or process directed to the coroner; and the case is not within the statute authorizing the coroner to act where the sheriff is a party. Hence, if the coroner permit the defendant to go at large on giving a new undertaking, the undertaking is a nullity.⁶

¹ Colby v. Sampson, 5 Mass. 310.

² Day v. Brett, 6 Johns., 22. But at page 422, § 991 of his work on sheriffs, Crocker cites the same case, and maintains that unless the statute expressly directs otherwise, a coroner must confine his prisoner in his own house.

³ Manning v. Keenan, 73 N. Y., 45; aff'g S. C., 9 Hun, 686; The Governor v. Gibson, 14 Ala., 326.

⁴ Ante, p. 27.

⁵ Manning v. Keenan, *supra*.

⁶ Douglass v. Warren, 19 Hun, 1.

Execution, when to Issue to Coroner.—An execution, in a case where the sheriff is a party or interested, must be directed either to a particular coroner, or generally to the coroners of that county in which the sheriff resides. But the court may, in its discretion, order an execution, issued upon a judgment rendered against a sheriff, either alone or with another, to be directed to a person, designated in the order, instead of to the coroners, or a particular coroner, in which case it must be so directed. The person so designated must be of full age, a resident of the State, and not a party to the action, or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so designated executes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be collected by virtue of the execution; conditioned for the faithful performance of his duties under the execution. A certified copy of the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.¹ A coroner may convey lands sold by him under execution.²

SECTION II.

OF THEIR DUTIES IN CERTAIN CASES, AND IN SPECIAL PROCEEDINGS.

1. *In Proceedings to Remove Officers.*

All coroners, as well as all sheriffs, constables and marshals, to whom process in proceedings to remove officers shall be directed and delivered, must execute the same without any unnecessary delay.³

¹ Code Civ. Pro., §§ 173, 1362.

² Code Civ. Pro., § 1471; *Winslow v. Austin*, 5 J. J. Marsh (Ky.), 411.

³ Laws of 1866, chap. 629; 1 R. S. (7th ed.), 374; and see *ante*, p. 500.

2. *In the Care of Wrecked Property.*

The coroner of a county in which wrecked property is found, have powers and duties concurrent with the sheriff and wreck masters of such county. These powers and duties are stated in detail in part one of this work.¹

3. *In Investigation of the Origin of Fires.*

The powers and duties of coroners with reference to the ascertainment of the origin of fires, are such as, in a like case, devolve upon the sheriff or a deputy sheriff. These powers and duties have already been stated.²

¹ See *ante*, p. 484; and see Penal Code, § 538.

² *Ante*, p. 482; and see Laws of 1857, chap. 504; 3 R. S. (7th ed.), 2144.

CHAPTER III.

OF CORONER'S INQUESTS.

The principal duty of the coroner is to hold an inquisition with the assistance of a jury, over the body of any person who may have come to a violent death, or of one who died in prison, or of one who has been dangerously wounded. This duty is of great consequence to society, both for bringing criminals to punishment, and protecting innocent persons from accusation.

Powers of Board of Health over Coroners in New York City.—The board of health may from time to time fix and define the time of making, and the form of returns and reports to be made to said board by the coroners of the city of New York, in all cases of post mortem inquests, or viewing of dead bodies held by them or any of them; and the said coroners are hereby required to conform to the directions of said board in the premises, and it shall be the duty of every coroner at once, and before holding any inquest, upon being called upon to hold an inquest as aforesaid, or notified thereof, to immediately transmit and cause to be delivered to the secretary of said board of health, written notice of the fact of such call for holding inquests, in which shall be stated every particular then known to said coroner as to said call, the body, the place where it is, and the reported cause of death. If at any time said board, or the sanitary superintendent, shall deem the protection of the public health to demand, it may (so soon as the coroner's jury shall have viewed the dead body, and an autopsy thereof shall have been made, provided the coroner deems the same necessary) order the immediate burial of any dead body, or if he or it deems that the public health demands an immediate removal of said body, from the place of death to another place for inquest, may likewise at any

time order said immediate removal, and shall have power to cause said orders to be obeyed and executed.¹

SECTION I.

JURISDICTION OF CORONERS TO HOLD INQUEST.

The object of a coroner's inquest is to ascertain the cause of the death. The authority of the coroner, in this branch of his office, is necessarily judicial in its character.² This authority may be exercised by any corner within the limits of the county for which he is elected to serve as a coroner. In other words, the coroners of a county have concurrent jurisdiction to hold an inquisition over the body (within the county) of any person who may have come to sudden or violent death, or of one who died in prison, or of one who has been dangerously wounded. And, with respect to the matter, the jurisdiction of the coroner first exercising it, is exclusive of that of the other coroners of the same county. The coroner exercising jurisdiction in any particular case is the sole judge as to the propriety of holding the inquest. And where a person dies in one county and is buried in another, one of the coroners of the latter county may determine that it is proper to hold an inquest over the body.³ And the coroner is entitled to his fees under the statute, notwithstanding the verdict of his jury discloses the fact that the death of the deceased was a natural one, not occasioned by casualty or violence, unless it appear that the coroner had reason to know the fact before he determined to hold the inquest.⁴ But a coroner cannot sustain an action against one who has removed a dead body from the county, to recover fees which he might have charged upon holding an inquest.⁵ And after an inquest, *super visum corporis*, has been held by a coroner, in case of sudden or violent death, and an inquisition has been found by the jury, a second in-

¹ Consol. Act of 1882, § 568.

² *People v. Devine*, 44 Cal., 452.

³ *Jameson v. County Commissioners*, 64 Ind., 524.

⁴ *Boisliniere v. County Commissioners*, 32 Miss., 375; *Jameson v. County Commissioners*, 64 Ind., 524.

⁵ *Fryer v. Central R. R., etc., Co.*, 50 Ga., 581.

quest cannot be held unless the first shall have been vacated or set aside, or shall have been absolutely void.¹

Sudden Deaths to be Reported.—It shall be the duty of any citizen, within the city and county of New York, who may become aware of the death, within the county, of a person who shall have died from criminal violence, or by a casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner, to report such death forthwith to one of the coroners, or to any police officer, and such officer shall, without delay, notify the coroner of such death; and any person who shall willfully neglect or refuse to report such death to the coroner shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county prison not exceeding one year, or by a fine not exceeding \$500, or by both such fine and imprisonment.² And whenever a convict shall die in any State prison, it shall be the duty of the inspector having charge of the prison, and of the warden, physician and chaplain of the prison, if they, or either of them, shall have reason to believe that the death of the convict arose from any other than ordinary sickness, to call upon the coroner having jurisdiction, to hold an inquest upon the body of such deceased convict.³ In such case the inquest should be held at the place wherein the deceased convict had been confined. The coroner can in no case hold an inquest except, *super visum corporis*, upon view of the body; and when it has been buried he should dig it up, and after he and the jury summoned to make inquest have viewed it together, and after he has caused a *post mortem* examination to be made, he should direct it to be buried again.

When Justice to act as Coroner.—Any justice of the peace, in each of the several towns and cities of this State, except in New York city, is authorized and empowered, in case the attendance of a coroner cannot be procured within twelve hours after the discovery of a dead body, upon which an inquest was, in 1864, required by law to be held, to hold

¹ *People v. Budge*, 4 Park. C. R., 519; *Queen v. White*, 3 Ellis & E., 137.

² Consol. Act of 1882, § 1775.

³ 3 R. S. (5th ed.), 1093, § 125; *id.* (6th ed.), 1096, § 139; *id.* (7th ed.), 2617, § 102.

an inquest thereon in the same manner and with the like force and effect as coroners. In all cases in which the cause of death is not apparent, it shall be the duty of the justice to associate with himself a regularly licensed physician, to make a suitable examination for the discovery of said cause. Every such justice who shall so hold an inquest, shall receive the same fees for that service as were, in 1864, allowed by law to coroners for a like service.¹ In New York city, if all the coroners be absent, or be unable, for any cause, to attend, their duties, so far as they relate to holding inquests and their action thereon and consequent thereupon, may be performed by a police justice, but by no other officer, with the same authority, and subject to the same obligations and penalties as apply to the coroners.²

SECTION II.

CORONER'S JURY.

When Summoned.—In any county other than New York county, when a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died, under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or has committed suicide, he must go to the place where the person is, and forthwith summon not less than nine, nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at a specified place, to inquire into the cause of the death or wound.³ When, in the city of New York, any person shall die from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner, the coroner shall subpoena one of the coroner's physicians, who shall view the body of such deceased person externally, or make an autopsy thereon as may be required. It shall be the duty of the physician to whom such

¹ Laws of 1864, chap. 379; 3 R. S. (5th ed.), 1040, §§ 2, 3, 4; id. (7th ed.), 2574, 2575; see *State v. Errickson*, 40 N. J. L., 159.

² Consol. Act of 1882, § 1779.

³ Code Crim. Pro., § 773.

subpœna is so issued, to make the inspection and autopsy required, and to give evidence in relation thereto at the coroner's inquest. The testimony of such physician, and that of any other witnesses that the coroner may find necessary, shall constitute an inquest.¹ Should the coroner deem it necessary, he may call a jury to assist him in his investigation; or, should any citizen demand that a jury be called, he shall proceed to summon a jury as if he were acting as coroner in any county other than New York. Any citizen of this State, not over seventy years of age, and being at the time a resident of the county, may be summoned to serve as a juror upon a coroner's inquest in New York county; and any person who shall willfully neglect or refuse to serve as such juror when duly summoned, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county prison not exceeding one year, or by a fine not exceeding \$500, or by both such fine and imprisonment.² The coroner should summon the jurors in person. An oral notification to the requisite number of qualified persons of the time and place of holding the inquest, and that they are then and there required to attend as jurors, is sufficient. The coroner's power to summon an inquest includes the incidental means of rendering that power efficient; and he may therefore rightfully impose a fine on a juror who refuses to attend.³

Jury to be Sworn.—When six or more of the jurors appear, they must be sworn by the coroner to inquire who the person was, and when, where and by what means he came to his death, or was wounded, as the case may be, and into the circumstances attending the death or wounding, and to render a true verdict thereon, according to the evidence offered to them, or arising from the inspection of the body.

All the jurors who appear, before the jury is sworn, must be included in the jury; but if subsequent to the summoning the coroner ascertain that any one summoned is not qualified, as a juror is required by law to be, he may set him aside and proceed upon the inquiry with the rest, pro-

¹ Consol. Act of 1882, § 1773.

² Consol. Act of 1882, § 1774.

³ *Ex parte McAnully*, Charlt. (Ga.), 310.

⁴ Code Crim. Pro., § 774.

vided six qualified jurors remain. If less than six are left the coroner should summon enough others to make at least six.

Inspection of the Body.—After having been sworn, the jury, together with the coroner, should formally view and examine the body upon which the inquest is held. It is not sufficient that each one of the jurors, as well as the coroner, has seen the body once or more than once, but never when coroner and jury were all met together. *They must view it together as a coroner and his jury*, and not as individuals who have been, or may be, summoned to serve upon such jury. The body, if buried, must be dug up, and, after the viewing, it may be at once re-interred. The inquest may be held at any convenient place, and the body need not be present. Of course, the inquest should be held at the convenient place nearest to the point where the body was found.

Verdict, how Rendered.—After inspecting the body and hearing the testimony, the jury must render their verdict, and certify it by an inquisition in writing, signed by them, and setting forth who the person killed or wounded is, and when, where, and by what means he came to his death, or was wounded; and if he were killed or wounded, or his death were occasioned by the act of another, by criminal means, who is guilty thereof, in so far as by such inquisition they have been able to ascertain.¹ The inquisition should show before what coroner the same was taken; that it was taken upon the oath of good and lawful men of the county, whose names should appear in the body thereof; and it should further show when and where it was executed. The inquisition may, also, be signed by the coroner. If some of the jurors sign with their mark such signature should be properly attested, but it will be taken *prima facie*, that the signing was in the presence of each other.² Where there are two or more on the inquisition of the same name, it is not necessary to designate them by their abode or addition.³ If the manner in which the death or wound-

¹ Code Crim. Pro., § 777.

² Crocker on Sheriffs, p. 415, § 960, citing Lewen's Case, 2 Lewin's C. C., 125.

³ Crocker on Sheriffs, p. 415, § 960, citing Rex v. Nicholas, 7 Carr. & Payne, 538.

ing occurred cannot be ascertained by the jury, they should so state:

Fees of Jurors; Report of Coroner.—The fees of jurors necessarily summoned upon any coroner's inquest shall be not to exceed one dollar for each day's service, shall be a county charge, and shall be audited and allowed by the boards of supervisors in the same manner as other fees and charges are audited and allowed by them. But the coroner holding such inquest and summoning said jurors shall make report to the next succeeding board of supervisors after every such inquest of the names of such jurors, and the term of service of each, and upon what inquest rendered, on or before the third day of the annual session in each year.¹ The coroner is in no wise liable to the jurors summoned by him for their fees; nor indeed is he liable for the services of any one whom he employs in an inquest, under an express statutory authority directing him, or permitting him, to procure the assistance of others upon an inquest.²

SECTION III.

PROCEEDINGS ON INQUEST.

1. *Procuring Attendance of Witnesses.*

Coroner to Issue Subpœnas.—The coroner may issue subpœnas for witnesses, returnable forthwith, or at such time and place as he may appoint. He must summon and examine as witnesses, every person who, in his opinion, or that of any of the jury, has any knowledge of the facts; and he must summon as a witness a surgeon or physician, who must, in the presence of the jury, inspect the body, and give a professional opinion as to the cause of the death or wounding.³ Such subpœna as the coroner issues may be served by the coroner himself, or by any other person of suitable age and discretion. The subpœna should be served

¹ Laws of 1878, chap. 286; 3 R. S. (7th ed.), 2586, § 4; see *Kennedy v. Seamans*, 60 Ga., 612.

² But see *Van Hoevenbergh v. Hasbrouck*, 45 Barb., 197.

³ Code Crim. Pro., § 775.

by delivering a copy thereof to the person whose attendance as a witness is desired personally, and at the same time showing him the original.¹ No one is entitled to a fee for attending before the coroner as a witness. And one served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, as upon a subpoena issued by a magistrate in a criminal proceeding.² The manner of compelling attendance of witnesses has been hertofore stated.

Employment of Scientific Experts in New York City.—The several coroners elected in the city and county of New York, may, with the written consent first had and obtained of the district attorney and a justice of the Supreme Court, within said city and county, employ any scientific expert, engineer or toxicologist, to examine the body of any person who shall have died from alleged criminal violence, or by casualty, or in any suspicious or unusual manner, and as to the cause of whose death the said coroner shall have jurisdiction to inquire.³ The coroner should give to such scientific expert, engineer or toxicologist so employed by him, a certificate of such employment, so that the party employed may be in a position to recover from the city a reasonable compensation for his services rendered upon the matter of the inquest, at the request of the coroner.⁴

Employment of Physician.—Each coroner of New York city shall, on assuming office, appoint a qualified physician, who shall be a resident in said city, and shall be known as a "coroner's physician." Any vacancy in the office of coroner's physicians shall be filled by the board of coroners. The board of coroners, for cause, may remove the physicians appointed by them.⁵

In any other of the counties of this State, a coroner has power, when necessary, to employ not more than two competent surgeons to make post-mortem examinations and

¹ Code Crim. Pro., § 615.

² Code Crim. Pro., § 776; and see id., § 619; Code Civ. Pro., §§ 8-13, 853-863; and see Re Coroner, 11 Phil. (Penn.), 387.

³ Consol. Act of 1882, § 1771.

⁴ Id., § 1772.

⁵ Consol. Act. of 1882, § 1769; and see Allegheny Co. v. Watt, 3 Barr. (Pa.), 462.

dissections, and to testify to the same, the compensation therefor to be a county charge.¹ As the law now stands, the claim for the services of a physician, or of a scientific expert, rendered at an inquest on the request of a coroner, is a legal charge against the county in which the inquest is held; and the coroner is not liable personally to pay for the services, and should not include the charge for such services in his own account as an expense incurred by him.

Dissection of Body.—Whenever a coroner is authorized by law to hold an inquest upon a body, the right to dissect the body exists, so far as such coroner authorizes dissection for the purposes of the inquest, and no further.² A *post mortem* examination, conducted by surgeons employed by a coroner holding an inquest, is not a part of the inquest in such a sense as that every citizen has a right freely to attend it; no person has a right to be present at such examination, upon the ground that he is suspected of having caused the death. But the inquest proper is a judicial proceeding, and is within the policy of the statute which declares that the sittings of any court within this State shall be public, and every citizen may freely attend the same.³

2. *Testimony, how Taken; and where Filed.*

Examination of Witnesses.—The coroner should administer an oath to the witness, or cause him to affirm that he will tell the truth. Counsel may be present and assist the coroner in the examination; and any juror who desires so to do, may put a question to any witness. Ordinarily, however, the coroner himself conducts the examination; and it is his duty to present before the jury all the material testimony within his power, touching the death or wounding, as to the manner whereof the jury are to certify, and that which makes for, as well as against, the party suspected. If the party suspected is at the inquest, and there examined, the coroner should first notify him that he may answer or not the questions put to him. Yet, if the coroner fail to do this, and the person suspected is not under

¹ Laws of 1873, chap. 833, § 2, as amended by Laws of 1874, chap. 535; 3 R. S. (7th ed.), 2586; see *Jameson v. County Commissioners*, 64 Ind., 524.

² Penal Code, § 308.

³ *Crisfield v. Perine*, 15 Hun, 200; *aff'd*, 81 N. Y., 622; Code Civ. Pro., § 5.

arrest, or charged with the crime, his answers may be read in evidence against him on his subsequent trial for the alleged offense.¹ If he offer to produce witnesses on the inquisition, whose testimony would tend to establish his innocence, the coroner should cause them to be subpoenaed, and should permit the suspected party, or his counsel, to assist in the examination of such witnesses. Nothing but legal testimony, however, should be taken, and the coroner should insist that questions should be put to a witness only in the legal way.

Testimony to be Written.—The testimony of the witnesses examined before the Coroner's jury, or, in New York city, before the coroner without a jury, must be reduced to writing by the coroner, or under his direction.² The coroner may employ counsel to assist him in conducting the examination; and he may also employ a clerk to reduce the testimony to writing. In either case, the employment is by the coroner, and he is personally liable for the value of the services rendered. Any expense thus incurred will be a proper charge against the county, in the coroner's account, and should be audited by the board of supervisors upon its presentation. And the fact that a person so rendering service to the coroner has presented his claim to the board of supervisors, to be audited, and that they have acted upon it, and allowed a portion of the amount, will not bar an action against the coroner for the residue of the claim.³

The testimony should be taken down with pen and ink, or in such manner as to make a durable record. And the record should be so made and authenticated that the testimony of any witness should appear, upon the face of the record, to be the testimony of that witness; and it should show that the witness was first duly sworn, either by appending a *jurat* to the testimony, or the certificate of the coroner, stating the facts that the witness was first duly sworn, and then proceeded to testify as stated in the record. It should also appear that the testimony was written by the

¹ Crocker on Sheriffs, 414, § 955; citing Henderson's Case.

² Code Civ. Pro., § 778.

³ Van Hoevenbergh v. Hasbrouck, 45 Barb., 197.

coroner, or under his direction.¹ Perhaps, however, the *jurat*, or the certificate above described, would be sufficient for this purpose. Testimony taken officially, on an inquest, is, under circumstances, evidence against the party then or thereafter accused of the crime.² And to render it operative as impeaching testimony, the rule has been laid down that it must not only purport, on its face, to be the sworn statement of the witness; but proof *aliunde* must be given that it *was* the witness' sworn statement, in the absence of the usual *jurat*, or other formal authentication of the testimony.³

Testimony, How and Where Filed.—When the inquisition is properly executed, the coroner must forthwith file the testimony, with the inquisition, in the office of the clerk of the court of sessions of the county, or of a city court, having power to inquire into the offense by the intervention of a grand jury.⁴ If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it, with the testimony, to the magistrate before whom the defendant is brought.⁵ The coroner should make up one record, consisting of the inquest, signed by him, as well as by the jurors, and the testimony duly reduced to writing, and certified by him; and he should then add to the record his certificate of the inquest and the proceedings thereon. If the inquest is upon a dead body in New York county, this certificate should also contain, as near as the same can be ascertained, the name, surname, age, color, nativity, last occupation, and cause of death of the deceased person, and the ward and street, the place of such person's death, and last residence, the term of residence in said city, place of nativity; and the condition in life—whether single, married, widow or widower.⁶ An abstract of the testimony taken by him, and a copy of the inquisition and of such certificate, should be filed by the coroner with the clerk of the board of coroners, who should keep the same on file until it is turned over to the board of health, and a receipt taken therefor, except in the case of a homicide, in which case he shall transmit the same without delay, to the district at-

¹ The People v. White, 22 Wend., 167.

² 1 Phil. Ev., 371 (7th Lon. ed.).

³ People v. White, *supra*.

⁴ Code Crim. Pro., § 778.

⁵ Code Crim. Pro., § 779.

⁶ Consol. Act of 1882, § 604.

torney of the city and county of New York.¹ (In New York city the board of coroners may appoint a clerk, who shall receive an annual salary of \$3,500 per year, which shall be a county charge, and payable as other county salaries are paid.)² Upon the arrest of the defendant the clerk, in any county, with whom the inquisition is filed must, without delay, furnish to the magistrate a certified copy of it, and of the testimony returned therewith.³ If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it with the testimony, to the magistrate before whom the defendant is brought, as provided in section 781 of the Code of Criminal Procedure, who must return it with the depositions and statement taken before him, in the manner prescribed in section 221 of said Code.⁴

3. *Deliberation of Jury.*

After the jury have inspected the body and have heard all the testimony, they should be kept together, as juries in other cases are kept, by themselves, to deliberate upon their verdict. Not even the coroner is allowed to be in the room with them. Should any question of law arise during the deliberation, however, they may take the coroner's opinion upon it. It is not necessary that they should be kept together until they all shall have agreed upon the same verdict; for the jurors agreeing together may present an inquisition, according to the facts as they find them. It follows, as of course, that two or more inquisitions may be presented on the same inquest, a portion of the jury signing the one, and other portions, others of the inquisitions.⁵

SECTION IV.

1. *Coroner's Warrant.*

When to Issue.—If the jury on the inquest find that the person was killed or wounded by another, under circum-

¹ Consol. Act of 1882, § 1777; and see *State v. Evans*, 27 La. Ann., 297.

² Consol. Act of 1882, § 1768.

³ Code Crim. Pro., § 784.

⁴ Code Crim. Pro., § 779.

⁵ Crocker on Sheriff's, p. 415, §§ 959, 961.

stances not excusable or justifiable by law, or that his death was occasioned by the act of another, by criminal means, and the party committing the act be ascertained by the inquisition, and be not in custody, the coroner must issue a warrant, signed by him with his name of office, into one or more counties, as may be necessary, for the arrest of the person charged.¹ The statute,² under which the coroner had power to bind over the witnesses to testify at the next criminal court, is now superseded as the Code of Criminal Procedure provides that the coroner's warrant should direct that the person charged be taken before a magistrate of the county.³

Form of Warrant.—The coroner's warrant must be in substantially the following form.

"County of *Albany* (or as the case may be).

"In the name of the people of the State of New York :

"To any peace officer in this State :

"An inquisition having been this day found by a coroner's jury, before me, stating that *A. B. has come to his death by the act of C. D., by criminal means* (or as the case may be, as found by the inquisition).

"You are therefore commanded, forthwith, to arrest the above named *C. D.*, and take him before the nearest and most accessible magistrate in this county.

"Dated at the *city of Albany* (or as the case may be), the day of , 18 .

"E. F., Coroner of the county of Albany (or as the case may be)."⁴

Warrant; how Executed.—The coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information; except that when served in another county, it need not be indorsed by a magistrate of that county.⁵ The coroner is only interested in the issuance of the warrant, and in placing it in the hands of a proper officer to be executed. There his duty ends, so far as the person charged with the crime is concerned.

¹ Code Crim. Pro., § 780.

² 3 R. S. (5th ed.), 1036, § 6; id. (6th ed.), 1040, § 9.

³ Code Crim. Pro., § 781.

⁴ Code Crim. Pro., § 781.

⁵ Code Crim. Pro., § 782.

SECTION V.

Coroner's Duties After Inquest.

To Deliver Money, etc., to Treasurer.—The coroner must within thirty days after an inquest upon a dead body, deliver to the county treasurer, any money or other property which may be found upon the body, unless claimed in the meantime by the legal representatives of the deceased. If he fail to do so, the treasurer may proceed against him for its recovery, by a civil action in the name of the county.¹ Upon the delivery of money to the treasurer, he must place it to the credit of the county. If it be other property, he must, within thirty days, sell it at public auction, upon reasonable public notice; and must, in like manner, place the proceeds to the credit of the county.² If the money in the treasury be demanded within six years, by the legal representatives of the deceased, the treasurer must pay it to them, after deducting the fees and expenses of the coroner and of the county, in relation to the matter, or it may be so paid at any time thereafter, upon the order of the board of supervisors.³ Before auditing and allowing the account of the coroner, the board of supervisors must require from him a statement in writing, of any money or other property found upon persons on whom inquests have been held by him, verified by his oath, to the effect that the statement is true, and that the money or property mentioned in it has been delivered to the legal representatives of the deceased, or to the county treasurer.⁴

To make Report to Public Administrator in New York City.—In the city of New York, every coroner, within twelve hours after an inquest, shall report to the public administrator the name, if known, of the deceased person. If he neglects so to do, he will be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punishable by imprisonment in the penitentiary for a period not exceeding six months nor less than one month, or by a fine

¹ Code Crim. Pro., § 785; see *Smiley v. Allen*, 13 Allen (Mass.), 465.

² Code Crim. Pro., § 786.

³ Code Crim. Pro., § 787.

⁴ Code Crim. Pro., § 788.

or \$100, one moiety of which shall be given to the informer, and the other moiety paid into the city treasury.¹

Records to be kept by Board of Coroners in New York City.—The board of coroners shall direct a book to be kept which shall contain the name, if known, of every deceased person reported, under existing laws, at the office of the board of coroners, or to any of its members, the place where the body was found, and the name of the coroner who assumed charge of the case; also a book which shall contain the name of the deceased, when known, the date when, and the place where, the inquest was held, the findings in full of the jury, and the date of death; also an index to such books, and to all inquisition papers, which shall contain, in alphabetical order, the names of deceased persons upon whom inquests have been held, the date of the inquests, the cause of death, the name of the coroner holding said inquest, and such other references as may be necessary to enable public officers, or parties interested, to examine fully the records of the coroner's office for legal purposes; and such books and records shall be kept at the office of the board of coroners (except such records as the clerk of said board is required to turn over to the board of health, or district attorney²), and shall be the property of the mayor, aldermen and commonalty of the city and county of New York.³

Care of Dead Body.—If, after an inquest upon a dead body, there be no one to claim the same, it is the duty of the coroner to see that it is properly interred at the expense of the county. Any person, except the coroner, who, in New York county, shall willfully touch, remove, or disturb the body of any one who shall have died from criminal violence, or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner, or who shall willfully touch, remove or disturb the clothing, or any article upon or near such body, without an order from the coroner, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county prison not exceeding one year, or by a fine not exceeding \$500, or by both such fine and imprisonment.⁴

¹ Consol. Act of 1882, § 246.

³ Consol. Act of 1882, § 1778.

² Consol. Act of 1882, § 1777.

⁴ Consol. Act of 1882, § 1776.

CHAPTER IV.

OF CORONER'S FEES AND EXPENSES.

Fees as Sheriff.—A coroner is entitled, for performing any duty of a sheriff, in an action or a special proceeding, in which the sheriff is, for any cause, disqualified, to the same fees to which a sheriff is entitled for the same services.¹ And for confining a sheriff in a house, by virtue of a mandate, and maintaining him while there, he is entitled to two dollars for each day, to be paid by the sheriff before the latter can be discharged from his custody.² When the coroner acts as sheriff, he must, upon the collection of an execution, or the settlement, either before or after judgment, of an action or a special proceeding, if he claims any fees which have not been taxed, upon the written demand of the person liable to pay the same, cause them to be taxed within the county, upon notice to the person making the demand, by a justice of the Supreme Court, a judge of a superior city court, or the county judge. After such a demand is made, the coroner cannot collect his fees until they have been so taxed.³

When the coroner is required to do the duties of a sheriff in criminal cases, he shall be entitled to and receive the same fees as sheriffs for the performance of like duties. And he shall receive, for performing the requirements of law in regard to wrecked vessels, three dollars per day and fractional parts thereof, and a reasonable compensation for all official acts performed, and mileage to and from such wrecked vessel, ten cents per mile.⁴

Fees on Inquest.—The coroner is entitled, for his services, in holding inquests and performing any other duty

¹ Code Civ. Pro., § 3310; see *ante*, part 1, chap. 7.

² Code Civ. Pro., § 3310, subd. 2.

³ Code Civ. Pro., § 3287.

⁴ Laws of 1873, chap. 833, § 1; 3 R. S. (7th ed.), 2586.

incidental thereto, to such compensation as is defined by special statutes.¹

The coroners in and for the State of New York, except in the counties of New York, Kings and Erie, shall be entitled to receive the following compensation for services performed :

Mileage to the place of inquest and return, per mile.....	\$0 10
Summoning and attendance upon jury.....	8 00
Viewing body.....	5 00
Serving of subpoena, per mile traveled.....	10
Swearing each witness.....	15
For each and every day, and fractional parts thereof, spent in taking inquisition (except for one day's service)	3 00
Drawing inquisition for jurors to sign	1 00
Copying inquisition for record, per folio, for one copy only.....	25
For making and transmitting statement to board of supervisors, each inquisition	50
For taking ante-mortem statement per day and fractional parts thereof.	3 00
Per mile traveled for taking ante-mortem statement	10
For taking deposition of injured person in extremis	1 00
For issuing warrant for the arrest of the party charged with crime by the verdict of jury.....	25 ²

Fees for Delivering Money or Property Found on Deceased, to County Treasurer.—A coroner is entitled to receive a reasonable compensation for making and rendering a statement, in writing, to the board of supervisors of any moneys or other property found upon persons on whom inquests have been held by him ; and for his trouble and services in the preservation and delivery to the county treasurer, or to the deceased's legal representatives, of such money and property, and all reasonable expenses incurred by him in relation thereto, to be audited by the board of supervisors, in addition to the fees or compensation to be allowed by them for holding an inquest.³

Expenses.—A coroner shall be reimbursed for all moneys paid out, actually and necessarily, by him in the discharge of official duties as shall be allowed by the board of super-

¹ Code Crim. Pro., § 790.

² Laws of 1873, chap. 833, as amended by Laws of 1874, chap. 535; 3 R. S. (7th ed.), 2586; id. (6th ed.), 1052, § 17.

³ Laws of 1842, chap. 155, § 4; 3 R. S. (5th ed.), 1038, § 13; id. (6th ed.), 1041, § 16; id. (7th ed.), 2574, § 4.

visors.¹ The amendment of 1874 added the words "as shall be allowed by the board of supervisors." These words do not give the board the right to arbitrarily allow or disallow the account for such disbursements. If the account is for moneys actually and necessarily expended by the coroner in the discharge of his official duties, the board may be compelled to audit the claim. The coroner should state his account with particularity, and in detail, so that the board in examining it may determine whether or not the moneys were expended, actually and necessarily, in the discharge of his official duties.

Fees as Witness.—Whenever, in consequence of the performance of his official duties, a coroner becomes a witness in a criminal proceeding, he shall be entitled to receive mileage to and from his place of residence, ten cents per mile, and three dollars per day for each day, or fractional parts thereof, actually detained as such witness.²

Coroner's Accounts a County Charge.—All items of a coroner's compensation,³ and all moneys actually and necessarily expended by him in executing the duties of his office,⁴ are county charges, to be audited and allowed by the board of supervisors.

Before a coroner, or any other town or county officer, can have his claim passed upon or allowed by the board of supervisors, he must exhibit to them a just and true statement in writing of the nature of the services performed by him, and the amount of money actually and necessarily disbursed by him in the performance of his official duties; and how and why the necessity for such disbursement arose. And in all cases in which a specific compensation for any such service or disbursement is not provided by law, he should also exhibit, in writing, a just and true statement of the time actually and necessarily devoted to the perform-

¹ Laws of 1873, chap. 833, as amended by Laws of 1874, chap. 535, 3 R. S. (6th ed.), 1052, § 17; id. (7th ed.), 2586.

² Laws of 1873, chap. 833, § 3, as amended by Laws of 1874, chap. 535; 3 R. S. (6th ed.), 1053, § 19; id. (7th ed.), 2586, § 3.

³ Laws of 1873, chap. 833, § 4; 3 R. S. (6th ed.), 1053, § 20; id. (7th ed.), 2587, § 5.

⁴ 1 R. S. (5th ed.), 902, § 3, subds. 8, 9; id. (6th ed.), 927, § 3, subds. 8, 9; 2 id. (7th ed.), 979, § 3, subds. 8, 9.

ance of such service, and showing why the amount disbursed was no more than was actually necessary in the particular instance.¹

Compensation in New York City.—Each of the coroners in New York county shall be paid, in full satisfaction for his services, a yearly salary of \$5,000, and shall be allowed for contingent expenses, including clerk and office hire, and for the preservation of his records and the records of the board of coroners, and all other incidental expenses, a sum not to exceed \$3,000 per annum, which contingent and incidental expenses shall be audited and paid as the contingent and incidental expenses of other officers of said city and county are audited and paid; and said salary and allowance shall be in lieu of all his fees or compensation heretofore a charge upon the county of New York, or the mayor, aldermen and commonalty of the city of New York.²

¹ 1 R. S. (5th ed.), 902, §§ 1, 2; id. (6th ed.), 927, §§ 1, 2; 2 id. (7th ed.), 978, §§ 1, 2.

² Consol. Act of 1882, § 1767.

PART III.

OF CONSTABLES.

CHAPTER I.

OF THEIR QUALIFICATIONS, ELECTION, TERM OF OFFICE;
DUTIES GENERALLY, AND DISABILITIES.

The kinds of constables known to the laws of this State are :

1. Town constables elected by the various towns ;¹
2. Police constables appointed by the boards of trustees of incorporated villages, respectively ;²
3. Marshals and policemen of cities ;³
4. Game and fish protectors appointed by the governor ;⁴
5. Game constables, appointed by the various boards of supervisors ;⁵
6. Bay constables elected in certain towns ;⁶
7. Officers of rifle ranges.⁷

Of these classes the first three are declared peace officers by statute.⁸ And the others have power to arrest without warrant for any violation of the law, to preserve which they were specially appointed. Marshals, and police constables in some cases, within prescribed limits, have powers, duties and responsibilities co-extensive with those of town constables.

In some cities and towns in the United States are officers

¹ 1 R. S. (7th ed.), 808, § 3.

² 1 R. S. (7th ed.), 890, § 2, subd. 3.

³ 1 R. S. (7th ed.), 349, § 15.

⁴ Laws of 1880, chap. 591.

⁵ Laws of 1879, chap. 534, § 38.

⁶ Laws of 1875, chaps. 89, 492.

⁷ Laws of 1870, chap. 80, § 277 ; 3 R. S. (7th ed.), 791, § 277.

⁸ Code Crim. Pro., § 154.

called high constables, who are the principal police officers in their jurisdiction; but generally what are known in England as petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5th and 6th Vict. C., 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of those heads.¹ Town constables are the ministerial officers of the justice's courts, and are authorized and commanded to execute all process issuing from such courts in the counties respectively for which they are elected. In certain cases special powers and duties have been given and imposed upon them by statute. Of their duties as peace officers enough has been said in part one of this work.² Their jurisdiction is co-extensive with the county.³ In speaking of constables, hereinafter, town constables are intended unless other classes are specially mentioned. Many of the duties of constables are performed as are like duties of the sheriff. Where the duties of the former differ from those of the latter, the duty and the manner of executing it will be detailed in these chapters. Otherwise reference is made to part one, of sheriffs.

¹ 1 Bouv. Law Dict., 334. From the authority cited we also learn that the most satisfactory derivation of the term, and history of the origin of the office of constable, is that which deduces it from the French, *comestable*,—Latin, *comes-stabuli*,—who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of everything relating to military matters, as the marching of troops, their encampment, provisions, etc. (citing Guyot, *Rep. Univ.*). The same extensive duties pertained to the constable of Scotland. (Bell, Dict.) The duties of this officer in England, seem to have been first fully defined by the Stat. Westm. (13 Edw., 1); and question has been frequently made whether the office existed in England before that time (citing 1 Black's Comm., 356). It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing men, borsholders, etc., were added to its other functions. (Citing Cowel; Willcock, Const.; 1 Blackst. Comm., 356.)

² *Ante* pp 38–57, 94–115.

³ See *Mills v. Kennedy*, 1 Johns., 502; *People v. Garey*, 6 Cow., 648.

SECTION I.

OF THEIR QUALIFICATIONS AND ELECTION.

1. *Qualification.*

Any elector of a town is eligible to the office of constable in the town of which he is an elector.¹ He may be chosen a constable, though at the time of being chosen he is holding an office of constable, or any other office, the duties of which are not incompatible with his duties as constable.

2. *Election and Appointment.*

When and How in Towns Generally.—In the several towns of counties containing 300,000 inhabitants or less, as ascertained by the last State census taken prior to 1881, there shall be chosen at the annual town meeting for each town, not more than five constables.² At any annual town meeting the electors may determine what number of constables shall be chosen for the then ensuing year.³ Such determination suffices only for the *then ensuing year*. If a less number than four is determined upon, the determination must be made by a formal vote or resolution of the electors, in the same manner as in relation to other matters. Otherwise, there can be no legal limitation of the number; and if, without such limitation, more than five persons are voted for, the five persons having the greatest number of votes are entitled to discharge the duties and receive the emoluments of the office.⁴ But the election at any town meeting of any number less than five, or less than the number legally determined upon by the duly expressed will of the electors, if such determination has been made, ousts *all* the constables of the preceding year, though they may have been more in number than those elected to fill their places. The general rule is, that where there are several town officers of the same kind, if the electors, at their annual meeting, choose one or more officers of the particular class, although less than the whole number authorized by law, all

¹ 1 R. S. (5th ed.), 825, § 31; id. (6th ed.), 832, § 32; id. (7th ed.), 817, § 11.

² 1 R. S. (5th ed.), 815, § 3; id. (6th ed.), 823, § 9; id. (7th ed.), 808, § 3.

³ 1 R. S. (5th ed.), 817, § 9; id. (6th ed.), 824, § 12; id. (7th ed.), 808, § 5.

⁴ *People v. Adams*, 9 Wend., 333.

the incumbents of the office of the previous year are superseded. It is impossible to say whose place, in particular, any one of the persons newly elected is to take.¹ Where the number of constables is regularly limited to any number less than five, all ballots containing more names for constables than the number limited, as where the number limited is four, and the ballot contains five names, must be rejected.²

How and When Elected in a Limited Number of Towns.

—In the several towns of the counties containing upward of 300,000 inhabitants, as determined by the last State census prior to 1881, constables are to be elected by ballot by the electors of such towns respectively, at the general election held therein, next prior to the time provided for holding the annual town meeting in such towns, and the terms of office of the constables so elected shall commence and determine on the first day of January.³ The terms of office of constables in such towns shall be five years from the first day of January next after their election. “At the first election held under this act, five constables shall be elected, who shall hold their offices for one, two, three, four and five years respectively, which shall be determined by the number of votes cast for each, those receiving the highest number of votes to have the longest term. In case of a tie vote, the town clerk shall select and decide; and thereafter only one constable shall be elected in each year for the full term of five years.”⁴

Proceedings on Election.—Constables must be chosen by ballot.⁵ Before the electors shall proceed to elect constables, or other town officers, proclamation shall be made of the opening of the poll, and proclamation shall in like manner be made, of each adjournment, and of the opening and closing of the poll, until the election be ended.⁶

When and how Appointed.—If any town, in which constables may be elected at the annual town meeting, shall

¹ *People v. Jones*, 17 Wend., 81.

² *People v. Loomis*, 8 Wend., 396.

³ Chap. 564 of the Laws of 1881, § 1.

⁴ Laws of 1881, chap. 564, § 13.

⁵ 1 R. S. (5th ed.), 821, § 2; id. (6th ed.), 829, § 2; id. (7th ed.), 816, § 2.

⁶ 1 R. S. (5th ed.), 821, § 1; id. (6th ed.), 829, § 1; id. (7th ed.), 816, § 1.

omit or neglect to choose such officers, or any of them, at any town meeting, it shall be lawful for any three justices of the peace of said town, by a warrant under their hands and seals, within five days after such town meeting, to appoint such officer or officers, and the person or persons so appointed shall hold their respective offices until others are chosen or appointed in their places, and shall have the same powers, and be subject to the same duties and penalties, as if they had been duly chosen by the electors; but if the justices of the peace fail to so appoint, it shall be the duty of the town clerk, within thirty days thereafter, to call a special town meeting for the purpose of electing such officer or officers.¹ The justices making such appointment shall cause such warrant to be forthwith filed in the office of the town clerk, who shall forthwith give notice to the person appointed.² In case of a like omission or neglect to choose constables, in towns in which such officers are chosen at the general election, the supervisors and justices of the peace, or a majority of such officers, in the town where the omission occurs, shall have power to appoint, and shall file the certificate of such appointment forthwith in the office of the town clerk. The persons so appointed shall enter upon their duties as soon as they shall have duly qualified, and shall serve until the first day of January next succeeding the then ensuing general election.³

3. *Vacancy.*

When Office Becomes Vacant.—The office of a constable becomes vacant on the happening, before the expiration of the term of his office, of either—

1. The death of the incumbent;
2. His resignation;
3. His removal from office;
4. His ceasing to be an inhabitant of the town for which he shall have been chosen or appointed;
5. His conviction of an infamous crime, or of an offense involving a violation of his oath of office;

¹ 1 R. S. (5th ed.), 828, § 56; as amended by Laws of 1874, Chap. 543; 1 R. S. (6th ed.), 835, § 57; id. (7th ed.), 821, § 31.

² 1 R. S. (5th ed.), 828, § 67; id. (6th ed.), 835, § 58; id. (7th ed.) 822, § 32.

³ See Laws of 1881, chap. 564, § 10; 1 R. S. (7th ed.), 825, § 10.

6. His refusal or neglect to take the oath of office, within the time required by law, or to give or renew any bond within the time prescribed by law ;

7. The decision of a competent tribunal, declaring void his election or appointment.¹

A resignation by implication may take place, by being appointed and accepting a new office incompatible with that of constable.² If it appear that, though a cause of vacancy has happened, the incumbent still claims to be a legal officer, and authorized to act as such, as where he neglects to take the oath of office or to file the requisite bond, he is *de facto* a constable, and his official acts, so far as the public and third persons are concerned, are valid as though he was an officer *de jure*, and his title and acts can only be questioned in a direct proceeding in which they are in issue.³ But where a party sues, or defends in his own right as a constable, it is not sufficient that he be merely an officer *de facto*; he must be one *de jure*.⁴ A *de facto* officer can never be compelled to act. He may stop short at any time in his official action, and will incur no liability by his mere omission to act.⁵

Resignation.—Any three justices of the peace of a town in which constables are elected at a town meeting, may, for sufficient cause shown to them, accept the resignation of any constable of their town.⁶ In the other towns the supervisor and justices of the peace, or a majority of them, are authorized to accept such resignation.⁷

Removal.—If any constable shall have collected any money on execution, and a recovery therefor shall have been had against his sureties, upon a complaint thereof being made to any three justices of the same town, they shall

¹ 1 R. S. (5th ed.), 827, § 54; id. (6th ed.), 834, § 55; id. (7th ed.), 370, § 34.

² Angel & Ames on Corp. (1st ed.), 255; *People v. Carrique*, 2 Hill, 93; *Van Orsdall v. Hazard*, 3 id., 243; *Riddle v. County of Bedford*, 7 Serg. & Rawle (Penn.), 386.

³ *Snyder v. Schram*, 59 How. Pr., 404; *Bliss v. Day*, 68 Me., 201; *Petersilea v. Stone*, 119 Mass., 465.

⁴ *People v. Weber*, 89 Ill., 347; *Same v. Same*, 86 id., 283; *People v. Hopson*, 1 Denio, 374; *People v. Van Nostrand*, 46 N. Y., 375.

⁵ *Olmsted v. Dennis*, 77 N. Y., 373, 387; *Bentley v. Phelps*, 27 Barb., 524.

⁶ 1 R. S. (5th ed.), 828, § 58; id. (6th ed.), 835, § 59; id. (7th ed.), 822, § 33.

⁷ Laws of 1881, chap. 564, § 10.

summon such constable to appear before them, to show cause why he should not be removed from his office. If such complaint be established to the satisfaction of such justices, or any two of them, after a hearing of the parties, or after the refusal or neglect of the constable to appear upon such summons, they shall, by an instrument, under their hands, remove such constable from his office, assigning therein the reason of such removal, and shall file the same in the office of the town clerk, who shall forthwith cause a certified copy thereof to be served on such constable. Upon the service of a copy of such instrument, certified by the town clerk, on the constable named therein, such constable shall cease to have any power or authority as such, and his office shall be deemed vacant.¹ These provisions for the removal of constables apply to the justices' courts in the cities of Albany, Hudson and Troy respectively; but they shall not be considered as applicable to the courts in the city of New York.² In the city of Albany, the instrument of removal shall be filed with the clerk of Albany county.³

Vacancy, how Filled.—If any person elected, chosen or appointed to the office of constable shall refuse to serve, or shall die or resign or remove out of the town, or become incapable of serving, before the next annual town meeting after he shall be elected, chosen or appointed, in any town where constables are chosen at the annual town meeting, the town clerk shall, within eight days after the happening of such vacancy, on the petition of not less than twenty-five legal voters of the town, call a special town meeting for the purpose of supplying the same. In case a special town meeting be not so called, then, and not otherwise, any vacancy so occurring shall be filled by appointment made by not less than three justices of the peace.⁴ If the electors shall not, within fifteen days after the happening of such

¹ 3 R. S. (5th ed.), 460, §§ 193-195; id. (6th ed.), 431, §§ 196-198; id. (7th ed.), 2371, §§ 268-270.

² 3 R. S. (5th ed.), 454, § 157; id. (6th ed.), 426, § 160; id. (7th ed.), 2371, § 231.

³ 3 R. S. (5th ed.), 403, § 38.

⁴ 1 R. S. (5th ed.), 828, § 56; id. (6th ed.), 935, § 57, as amended by laws of 1881, chap. 391; id. (7th ed.), 823, § 34.

vacancy, supply the same by an election at town meeting, the same shall be supplied by the justices of the town in the like manner and with the like effect as above provided. Whenever a vacancy shall occur, which justices of the peace are authorized to fill, and there shall be less than three justices residing in the town in which such vacancy shall occur, the justice or justices residing in such town may associate with themselves one or more justices of the peace from any adjoining town, as may be necessary to make the number of three; and such three justices shall have the like power to fill such vacancy as if they were respectively justices of the town in which the vacancy occurred.¹ In towns where constables are elected at the general election, the supervisor and justices of the peace, or a majority of such officers, have power to fill vacancies happening from any cause.²

4. *Notice of Election or Appointment.*

After the canvass of the votes for the constable, or other town officer is completed at a town meeting, a statement of the result shall be entered at length by the clerk of the meeting, in the minutes of the proceedings to be kept by him, which shall be publicly read by him to the meeting; and such reading shall be deemed notice of the result of such election, to every person whose names shall have been entered as a voter. The clerk of every town meeting, within ten days thereafter, shall transmit to each person elected to the office of constable, whose name shall not be entered on the poll list as a voter, a notice of his election.³ The manner of giving notice in case of appointment by justices of the peace, has already been noticed. The town clerk should notify, in writing, those constables who are duly elected such at a general election, as is provided for notifying those whose names do not appear upon the poll list as voters.

¹ 1 R. S. (5th ed.), 829, § 62; id. (6th ed.), 836, § 63; id. (7th ed.), 822, §§ 35, 37.

² Laws of 1881, chap. 564; 1 R. S. (7th ed.), 825, § 10.

³ 1 R. S. (5th ed.), 823, §§ 20, 21; id. (6th ed.), 831, § 20, 21; id. (7th ed.), 817, §§ 9, 10.

SECTION II.

OATH OF OFFICE AND SECURITY.

Every Person Chosen or Appointed to the office of constable, before he enters on the duties of his office, and within eight days after he shall be notified of his election or appointment, shall take and subscribe the oath of office provided by the constitution, and shall execute, in the presence of the supervisor or town clerk of the town, with at least two sufficient sureties, to be approved by such supervisor or town clerk, an instrument in writing, by which such constable and his sureties shall jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection ; and shall also jointly and severally agree and become liable to pay each and every such person for any damages which he may sustain from or by any act or thing done by said constable, by virtue of his office of constable. Every constable so chosen or appointed shall, in good faith, be an actual resident of the town or ward in which he shall be chosen or appointed.¹ The supervisor or town clerk shall endorse on such instrument, his approbation of the sureties therein named, and shall then cause the same to be filed in the office of the town clerk ; and a copy of such instrument, certified by the town clerk, shall be presumptive evidence in all courts, of the execution thereof by such constable and his sureties.² If any person chosen or appointed to the office of constable shall not give such security and take such oath, as is above required, within the time limited for that purpose, such neglect shall be deemed a refusal to serve.³

As to the Oath.—The oath of the constable may be subscribed and sworn before the town clerk of the town in which such officer shall be elected ; such oath shall be administered without fee or reward.⁴ The oath may, also, be

¹ 1 R. S. (5th ed.), 826, § 43, as amended by Laws of 1872, chap. 788 : 1 R. S. (6th ed.), 833, § 43 ; id. (7th ed.), 818. § 21, 825, § 12, Laws of 1881, chap. 564. § 12.

² 1 R. S. (5th ed.), 826, § 44 ; id. (6th ed.), 834, § 45 ; id. (7th ed.), 819, § 22.

³ 1 R. S. (5th ed.), 826, § 46 ; id. (6th ed.), 834, § 47 ; id. (7th ed.), 819, § 24.

⁴ Laws of 1838, chap. 172 ; 1 R. S. (7th ed.), 820.

taken before another officer authorized to administer official oaths, as a Supreme Court justice or a county judge. But in no case is the officer administering the oath entitled to a fee therefor.¹ If any constable shall enter upon the duties of his office, before he shall have taken such oath, he shall forfeit to the town the sum of fifty dollars.² The oath should be filed, within the eight days, in the office of the town clerk.³

As to the Bond.—The statute requires an instrument in writing which may, or may not, be in the form of a bond. If in the form of a bond, it should be to the People of the State, and not to the people of a county.⁴ The better instrument, however, is one exactly as the statute requires it to be, viz.: an agreement to pay each and every person entitled thereto, all such sums of money as the constable may become liable to pay on account of any execution which shall be delivered to him for collection; and also to pay each and every such person for any damages which he may sustain from or by any act or thing done by the constable, by virtue of this office of constable.⁵

Where the instrument is in the form of a bond to the people, *debt* will not lie upon the bond in the name of the party injured. The action should be *covenant* on the condition of the bond, or debt in the name of the people, the obligees.⁶

The sureties who have executed the bond cannot object that there was a want of compliance with the statute provisions. Thus the omission of the town clerk to indorse his approval, the fact that the instrument was not in the form contemplated by the statute, and contains unnecessary recitals, and an agreement on the part of the constable to execute all process—do not avail the sureties in a suit by an execution creditor to recover for the constable's neglect to return an execution.⁷ Previous leave to sue upon the bond

¹ Code Civ. Pro., § 3289.

² 1 R. S. (5th ed.), 827, § 54 ; id. (6th ed.), 834, § 55 ; id. (7th ed.), 820, § 29.

³ See Laws of 1881, chap. 564, § 12 ; 1 R. S. (7th ed.), 825, § 12.

⁴ Warner v. Racey, 20 Johns., 74 ; People v. Holmes, 2 Wend., 281 ; Same v. Same, 5 Wend., 191.

⁵ Dutton v. Kelsey, 2 Wend., 615.

⁶ Lawton v. Erwin, 9 Wend., 233 ; People v. Holmes, 2 id., 281 ; Same v. Same 5 id., 191.

⁷ Skellinger v. Yendes, 12 Wend., 306 ; and see Raymond v. Lent, 14 Johns 401.

is not needed. A right of action accrues at once upon an injury by an act of a constable, *as such*, to the party injured.¹ And the constable and his sureties cannot object that the security was not filed within the time, by the statute prescribed. The statute is directory, merely.² Constables, like sheriffs, are required to give an additional bond for the payment of moneys collected under the Military Code. Such bond is to be approved by the county judge of the county in which the constable resides.³

SECTION III.

TERM OF OFFICE.

Constables who are, or may be elected at annual town meetings, hold their offices for one year, and until others are chosen or appointed in their places, and have qualified.⁴ The five having the highest number of votes in town meeting are elected; unless the number is expressly reduced.⁵ The election, in such town, of less than the authorized number, as where five should be elected, and by reason of a tie vote, or from any other reason, a less number is elected, ousts all the constables in office.⁶ In towns where the constables are chosen at a general election, the term of office is five years counting from the first of January next after the election. At the end of five years the office is vacant, whether or not the incumbent's successor has been chosen or has qualified.⁷ A person in such town appointed to fill a vacancy in the office of constable holds the office until the first of January next subsequent to the then ensuing general election.⁸ If at a general election he is chosen to fill a vacancy, he holds the office from the first of January next after the election, for the then remaining and unexpired portion of the vacated term.⁹

¹ *People v. Holmes*, 2 Wend., 281.

² *Dutton v. Kelsey*, 2 Wend., 615.

³ Laws of 1870, chap. 80, § 218; 1 R. S. (7th ed.), 780, § 218; *ante*, pp. 4, 5.

⁴ 1 R. S. (5th ed.), 327, § 55; *id.* (6th ed.), 835, § 56; *id.* (7th ed.), 820, § 30.

⁵ *Opin. of Att'y Gen'l*, 426.

⁶ *People v. Jones*, 17 Wend., 81.

⁷ Laws of 1881, chap. 564, § 13; 1 R. S. (7th ed.), 826, § 13.

⁸ Laws of 1881, chap. 564, § 10; 1 R. S. (7th ed.), 825, § 10.

⁹ *Id.*, § 11.

SECTION IV.

DUTIES GENERALLY.

In the Execution of Process.—The conduct of constables, upon process from justices' courts, must be governed by the same law as that of sheriffs upon process of the higher courts, when there is no statute regulation.¹ In many special proceedings—and in some cases under the Military Code—they have powers the same as the sheriff. Upon a proper warrant they can make an arrest anywhere within the State. They can serve civil process issued by a justice of the peace anywhere within the county, and at a time, and in a manner, coincident with the service of a similar process of a higher court by the sheriff. They cannot now call out the power of the county to aid in the execution of process. But if a constable has reason to apprehend that resistance will be made to the execution of a mandate issued and delivered to him by a justice of the peace, he may deliver it to the sheriff of the county, with a written certificate, stating the facts, and requiring the sheriff to execute it.²

A mandate, issued by a justice of the peace, must be signed by him, and may be without seal. It must be entirely filled up, at the time when it is delivered to an officer to be executed, so as to have no blank, either in the date thereof or otherwise; except that there may be a blank in a subpoena for the name of any or all of the witnesses. A mandate, otherwise issued and delivered to an officer to be executed, is void.³ And the fact that it is void will be apparent on the face of the mandate; and the officer will not be protected by the mandate in the execution thereof. The justice may direct certain alterations to be made in a process; but a general authority to constables to alter a process, or a special authority to alter it on a contingency specified (as where the constable is told to alter, in a summons, the date for the defendant's appearance, in case service cannot be made in proper time prior to the date as it stands), is highly improper, and renders the process void if the alteration be made.⁴

¹ *Pixley v. Butts*, 2 Cow., 421.

² Code Civ. Pro., § 8135.

³ Code Civ. Pro., § 8158.

⁴ *Pierce v. Hubbard*, 10 Johns., 405.

A summons or an execution in a civil action, issued by a justice of the peace, should be directed to any constable of the county,¹ a warrant or other process, in a criminal action or proceeding, so issued, should be directed to any peace officer of the county.² Any constable of the county, to whom the mandate is delivered, may execute the same. The word "mandate" includes a writ, process, or other written direction, issued pursuant to law, out of a court, or made pursuant to law by a court or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer or other person, named or otherwise designated therein, to do, or to refrain from doing, an act therein specified.³

It is the duty of the constable to execute every mandate issued by a justice of the peace, and directed to any constable of the county, or to any peace officer of the county, delivered to him to be executed,⁴ unless he can certify to facts which justify him in delivering the process to the sheriff.⁵ He must execute the mandate according to the tenor thereof; and he cannot act by deputy.⁶ But a justice of the peace who issues any mandate in a civil action, except a venire, may, at the request of the party, whenever he deems it expedient so to do, empower, by a written authority indorsed upon the mandate, any person of full age, not a party to the action, to serve or otherwise execute it. For that purpose the person so empowered has all the power and authority, and is subject to all the obligations and liabilities of a constable; and his return is evidence, in like manner, as a constable's. But a person so empowered is not entitled to any fee or reward for his services.⁷ Where a person is thus empowered to serve a summons, the summons must be returned to the justice with a written return thereon, to confer jurisdiction upon the justice to proceed in the action. The service cannot be proved by the oath of the person making it.⁸ If a person be so empowered to execute a mandate, even though it be an execution, he need not take the oath, nor give the security required of a constable.

¹ Code Civ. Pro., §§ 2877, 3035.

² Code Crim. Pro., § 156.

³ Code Civ. Pro., § 3343, subd. 2.

⁴ Code Civ. Pro., § 3157.

⁵ Code Civ. Pro., § 3158.

⁶ Code Civ. Pro., § 3157.

⁷ Code Civ. Pro., § 3156.

⁸ *Jackson v. Sherwood*, 50 Barb., 356.

The constable's powers and duties as a peace officer are the same as those of a sheriff.¹ Where his powers or duties as to the proper execution of any mandate differ from those of a sheriff, the difference will appear hereinafter.

SECTION V.

DISABILITIES OF A CONSTABLE; AND ACTS PROHIBITED.

Not to Practice as an Attorney.—A constable shall not, during his continuance in office, practice as an attorney or counselor in any court.² This provision of the Code of Civil Procedure is qualified, however, by a subsequent one of the same Code, which states that, "subject to the provisions of section 63 and 64 of this act, any person, other than the constable who served the summons or the venire, or the law partner or clerk of the justice, may be the attorney for a party to an action before a justice of the peace."³

Section sixty-three is as follows: "A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court in the city and county of New York, or in the county of Kings, or make it a business to practice as an attorney in a court in either of those counties, unless he has been regularly admitted to practice as an attorney or counsellor in the courts of record of the State."

Section sixty-four reads as follows: "A person who violates the last section is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail, not exceeding one month, or by a fine of not less than \$100, or more than \$250, or by both such fine and imprisonment. A judge or justice of the peace, within the city and county of New York, or the county of Kings, who knowingly permits to practice in his court, a person who has not been regularly admitted to practice in the courts of record in the State, is guilty of a misdemeanor, and shall be punished as prescribed in this section. But this and the last section do not apply to a case, where a person appears in a cause, to which he is a party."

¹ See *ante*, pp. 38-57, 94-119.

³ Code Civ. Pro., § 2889.

² Code Civ. Pro., § 62.

Not to Receive Reward.—A constable shall not ask or receive any money, or other valuable thing, from any person, as a consideration, reward, or inducement for omitting or delaying to arrest a person, or to take him to jail, or to sell property, by virtue of an execution, or to execute any other duty, pertaining to his office; or any money or valuable thing, other than the fees expressly allowed to him by law, for executing any duty pertaining to his office.¹

Not to Buy Claim.—A constable shall not, directly or indirectly, buy, or be interested in buying, a bond, note, or other demand or cause of action, for the purpose of bringing an action, or instituting a special proceeding before a justice, founded thereupon; nor shall a constable, either before or after an action, or a special proceeding, is commenced, lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money or other valuable thing to any person, in consideration of, or as a reward for, or an inducement to, the placing or having placed in his hands, a debt or other demand or cause of action, for prosecution or collection.² But the mere fact that plaintiff, suing as assignee of a demand, was a constable at the *time the summons was served*, does not preclude him from recovering. The mere purchase is not of itself sufficient evidence of the intent mentioned in the statute—the intent must be proved.³

Penalty.—A constable who violates any of the above provisions is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.⁴ The punishment is imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than \$500, or by both.⁵

As to the penalties for injuries to records and misappropriation by ministerial officers, and as to acts prohibited of public officers, and the penalties for certain acts or omis-

¹ Code Civ. Pro., § 3136.

² Code Civ. Pro., § 3137; and see Penal Code, § 137; Code Civ. Pro., § 74; Penal Code, §§ 138, 139.

³ *Warren v. Helmer*, 8 How. Pr., 419.

⁴ Code Civ. Pro., § 3138.

⁵ Penal Code, § 15.

sions, and the penalties for permitting escapes, see Part I, of Sheriffs.¹

Not to Serve Process on Sunday.—All service of legal process of any kind whatever, upon the first day of the week, is prohibited, except in cases of breach of the peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or except where such service is specially authorized by statute.² And whoever *maliciously* procures any process in a civil action to be served on Saturday, upon any person who keeps Saturday as holy time, and does not labor on that day, or serves upon him any process returnable on that day, or maliciously procures any civil action to which such person is a party to be adjourned to that day for trial, is guilty of a misdemeanor.³ The punishment for a misdemeanor, where the statute does not prescribe the punishment for the particular offense, has already been given.⁴ But the statute does not prohibit the rendition of judgment on Saturday in any case.⁵

¹ Penal Code, §§ 42, 43, 48, 49, 50, 51, 53, 54, 55, 56, 57, 114, 115, 116, 117, 118, 119, 120, 156, 470, 556, 557; *ante*, pp. 88-93.

² Penal Code, § 268.

³ Penal Code, § 271.

⁴ See Penal Code, § 15.

⁵ *Maxson v. Annas*, 1 Denio, 204.

CHAPTER II.

OF THEIR DUTIES AS TO CIVIL MATTERS.

SECTION I.

TO ATTEND COURT.

General Term.—Any two constables or police officers, who are notified so to do by the sheriff of their county, must attend a general term of the Supreme Court held in the county.¹

Trial Court.—As many constables as are notified in writing, and personally, so to do by the sheriff of their county, except in New York and Kings counties, must appear and attend upon a sitting, in the county, of a special term of the Supreme Court, or a term of the circuit court, county court, court of oyer and terminer, or court of sessions.² Any constable so notified, who neglects to attend as notified, may be fined by the court, at the term which he was notified to attend, a sum not exceeding five dollars for each day's neglect.³ When required by the court so to do, a constable attending any of the courts mentioned must act as crier therein, and for such service he is not entitled to any additional compensation.⁴ The duties of constables at any sitting of any of the courts enumerated are to obey the directions of the court, or the sheriff, as to any and all matters appertaining to the holding of the term and the preservation of order.

¹ Code Civ. Pro., § 242.

² Code Civ. Pro., §§ 97-99.

³ Code Civ. Pro., § 99.

⁴ Code Civ. Pro., § 92.

SECTION II.

SERVICE OF SUMMONS.

1. *Form and Contents of Summons.*

A summons issued by a justice of the peace for the commencement before him of a civil action, must be directed generally to any constable of the county where the justice resides ; and it must command him to summon the defendant to appear before the justice, at a place specified therein, to answer the complaint of the plaintiff in a civil action. Where the summons is accompanied with an order of arrest, it must be made returnable immediately upon the arrest of the defendant, within twelve days after the day when it was issued ; in every other case, it must be returnable at a time therein specified, not less than six nor more than twelve days after the day when it was issued.¹ If a verified complaint is, or has been, made when the summons is issued, such complaint must be attached to the summons.² The constable should see to it that a summons delivered to him to be served is properly filled out so as to have no blank.

2. *Service of Summons.*

Personal Service.—Personal service of the summons must generally be made by delivering a copy thereof to the defendant.³ In some cases, the copy may be delivered to another person. These cases will be hereinafter noted. Where a verified complaint is attached to a summons, service can *only* be made of both summons and complaint, by delivering to and leaving with *the defendant personally*, true copies thereof, not less than six nor more than twelve days before the return day thereof ; and the official certificate of the constable making such service shall be sufficient evidence thereof.⁴ Where service of a summons is personal, it must be made at least six days before the time of appearance specified therein ; except where it is accompanied with an order of arrest.⁵

¹ Code Civ. Pro., § 2877.

² Laws of 1881, chap. 414, § 1 ; 3 R. S. (7th ed.), 2370, § 1.

³ Code Civ. Pro., § 2878.

⁴ Laws of 1881, chap. 414, § 1 ; 3 R. S. (7th ed.), 2370, § 1.

⁵ Code Civ. Pro., § 2878.

Service Upon Corporation.—Where the defendant to be served is a corporation, the summons may be personally served upon it, by delivering a copy thereof to an officer or person to whom a copy of the summons in an action, brought against the corporation in the Supreme Court, might be delivered, as prescribed in sections 431 and 432 of the Code of Civil Procedure; or, to any director or trustee of the corporation by whatever official title he is called.¹ Where the defendant to be served is a domestic railroad corporation, and no officer thereof resides in the county, to whom a copy of the summons may be delivered as above prescribed, it may be personally served, by delivering a copy thereof to a local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of the corporation, residing in the county; unless, at least, thirty days before it was issued, the corporation had filed, in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against it, may be served; in which case the summons may be personally served by delivering a copy to the person so designated.² Where the defendant to be served is a corporation, association, partnership, or person, doing business in the State as an express company, and no person resides in the county to whom a copy of the summons may be delivered as heretofore indicated, it may be personally served by delivering a copy thereof to any local or general agent, agent to receive freight or parcels, route agent, or messenger of the defendant residing in the county, unless the defendant has designated a person upon whom service may be made as prescribed for the designation by a domestic railroad corporation; in which case the summons may be personally served by delivering a copy thereof to the person so designated.³ But where a person has been so designated by either an express company or a domestic railroad corporation, defendant, and the designation has been revoked; or it appears by affidavit, or the return of the constable, to whom the summons has been

¹ Id., 2879; and see *ante*, pp. 198, 199, 200.

² Code Civ. Pro., § 2880.

³ Code Civ. Pro., § 2881.

duly delivered for service, that the person designated is dead, or has ceased to reside within the county ; or that he cannot, after due diligence, be found within the county, so as to deliver a copy of the summons to him ; the original summons, or the second or third summons, issued as hereinafter specified, may be served as if a designation had not been made. Such a designation may be revoked by a writing, executed and filed in like manner as required for the purpose of making the designation.¹

Second and Third Summons.—Where it appears, *by the return of the constable*, to whom a summons has been delivered for service, that it was not served for any cause, a second summons may be issued by the same justice, in the same action, within twenty days after the first summons was issued ; and, *upon the like return thereof*, a third summons may be issued, within twenty days after the second was issued. The second or the third summons, as the case may be, relates back to the time when the first summons was issued ; and, with respect to all proceedings before actual service, the service thereof has the same effect as if the first summons had been seasonably served. For the purpose of issuing a new summons as thus prescribed, a previous summons may be returned upon the sixth, or any subsequent day, before the return day thereof.²

Name of Defendant Unknown.—Where the plaintiff is ignorant of the name, or part of the name of a defendant, that defendant may be designated in the summons, and in any other process, or proceeding in the action by a fictitious name, or by so much of his name as is known, adding a description identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action, and as sufficiently described therein for all purposes. When his name, or the remainder of his name, becomes known, the justice, before whom the action is pending, must amend the proceedings already taken, by the insertion of the true or full name, in place of the fictitious name, or part of a name, and all subsequent proceedings must be taken under the name so inserted.³

¹ Code Civ. Pro., § 2882.

³ Code Civ. Pro., § 2884.

² Code Civ. Pro., § 2883.

Return of Summons.—A constable, who serves a summons, must, at or before the time when the same is returnable, make and deliver to the justice a written return thereof, under his hand, stating the time when, and the manner in which, he served it. A constable who fails seasonably to serve a summons, delivered to him for service, must make a written return thereof under his hand, stating that it was not served, and the reason why he failed to serve it.¹ The return need not be upon the summons, or attached to it; and, indeed, it should not be, when the return is made that the person designated to receive service cannot, after due diligence, be found within the county, so as to deliver a copy of the summons to him. In such case the original summons might be served thereafter, as if no designation had been made.²

The return is important, for, without it, or with an insufficient return, the justice has no jurisdiction to proceed in the action, except upon a voluntary appearance of the parties. The service of a summons can *only* be shown by a return, whether the person making the service be, in fact and generally, a constable, or only empowered as a constable for that particular duty.³ Hence, the return should be sufficient, in all respects, to show that a legal service had been made. No other than a personal service is now provided for. Hence, the return should be, in effect, "Personally served, the day of , 18 , by delivering to, and leaving with, defendant a copy thereof;" or, if the defendant is a corporation, it should state the name of the officer or agent, and his exact relation to the defendant. In no case would a return of, "Served copy," giving date of service, be sufficient to confer jurisdiction.⁴ The return should expressly show—leaving nothing to be inferred—that a good, legal service had been made. Of course, if it is not written upon, or attached to, the summons, it should so refer to that process as to leave no manner of doubt concerning the paper of which return is made. If there are several defendants, and the manner of service upon each

¹ Code Civ. Pro., § 2885.

² Code Civ. Pro., § 2882.

³ *Jackson v. Sherwood*, 50 Barb., 356.

⁴ *Sperry v. Reynolds*, 65 N. Y., 179.

was not the same, the return should state how it was made upon each; and if any of the defendants could not be found within the county, or the last place of abode of any of them could not be ascertained, the return should so state.¹ But a proper return, *as to those actually served*, will give to the justice jurisdiction in the action, though no return is made as to those not served.² The return cannot be contradicted and shown to be false, collaterally, in another action, for the purpose of defeating the judgment.³ But either party to the action, who has sustained damage thereby, may show that the return was false in an action against the constable to recover the damages.⁴

SECTION III.

ARREST.

1. *Order of Arrest.*

When Granted.—At the time when the summons is issued, in an action specified in section 2895 of the Code of Civil Procedure, the justice who issues the summons must, upon the application of the plaintiff, and upon compliance with the Code provisions regarding the affidavit and undertaking on arrest in a civil action in a justice's court, grant an order for the arrest of the defendant, in either of the following cases :

1. Where the the defendant to be arrested is not a resident of the county.

2. Where the plaintiff is not a resident of the county, or, if there are two or more plaintiffs where all are non-residents thereof.

3. Where it appears to the satisfaction of the justice, by the affidavit of the plaintiff or another person, that the defendant is about to depart from the county, with intent not

¹ 1 Cow. Tr., 554.

² *Fogg v. Child*, 13 Barb., 246.

³ *N. Y. & E. R. R. Co. v. Purdy*, 18 Barb., 574; *Wheeler v. N. Y. & H. R. R. Co.*, 24 Barb., 414; *Bromley v. Smith*, 2 Hill, 517.

⁴ *Putnam v. Man*, 3 Wend., 202; *Tuttle v. Hunt*, 2 Cow., 436; *Bennett v. Fuller*, 4 Johns., 486.

to return thereto. But such an order cannot be granted, where the defendant, against whom it is applied for, is a female.¹

An order of arrest cannot be granted, except where the action is brought for one or more of the following causes :

1. To recover a fine or penalty.

2. To recover damages for a personal injury, of which a justice of the peace has jurisdiction ; an injury to property, including the wrongful taking, detention or conversion of personal property ; misconduct or neglect in office or in a professional employment ; fraud ; or deceit. But this subdivision does not apply to a claim for damages in an action to recover a chattel.

3. To recover for money received, or to recover a chattel ; where it appears that the money was received, or that the chattel was embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity.²

Contents of Order.—The order must be subscribed by the justice and indorsed upon or attached to the summons. It must briefly recite the ground of arrest ; and it must direct the constable, who serves the summons, to arrest the defendant ; to bring him forthwith before the justice ; and to notify the plaintiff of the arrest, if he can do so with reasonable diligence.³ The ground of the arrest is the cause of action, and one of the facts as to non-residence, actual or contemplated, required in section 2894 of the Code. If the order of arrest recite a proper ground therefor, and be in accordance with the statute in other respects, the constable is protected in executing it, although the requisite facts do not really exist. But if the order does not show a proper ground for arrest, or wants another statutory requirement, the constable will be a trespasser if he execute it, although upon the facts duly appearing before the justice, a proper warrant might have been issued.⁴

¹ Code Civ. Pro., § 2894.

² Code Civ. Pro., § 2897.

³ Code Civ. Pro., § 2895.

⁴ *Savacool v. Boughton*, 5 Wend., 170.

2. *Duty of Constable under Order.*

Order, how Executed.—The constable must, at the time of serving the summons, execute the order of arrest, by arresting the defendant, and *taking him forthwith* before the justice. If the justice be absent, or unable to try the action, the constable must *forthwith take the defendant* before another justice of the same town or city, who must take cognizance of the action and proceed therein, as if the summons had been issued, and the order of arrest had been granted by him.¹ In making the arrest the powers and duties of the constable are similar to those of the sheriff in like cases except in cases of resistance to process. Those who are exempt from arrest have already been pointed out.² The officer cannot of course arrest a person other than the defendant.

Return on Arrest—The constable, executing the order of arrest, must *forthwith* deliver to the justice the order, and a written return thereto, under his hand, stating the manner in which he had executed it, and either that he has notified the plaintiff, or that he could not do so with reasonable diligence. If he returns that he has notified the plaintiff, the latter must appear within one hour after the defendant has been brought before the justice, otherwise judgment of non-suit must be rendered against him.³ Though the return be regular on its face, with the assent of the defendant, yet if he be not brought before the justice, a judgment against him is void.⁴

To Keep Defendant in Custody.—The constable executing the order, or another constable, by direction of the justice, must keep the defendant in custody, until he is discharged by order of the justice, or judgment is rendered in his favor; but the detention shall not, in any case, exceed twelve hours from the time when the defendant is brought before the justice; unless, within that time, a venire is issued, or the trial of the action is commenced, or unless either is delayed with the express assent of the defendant.⁵ The defendants discharge from arrest may be ordered by the justice at any time before judgment, on a proper motion

¹ Code Civ. Pro., § 2898.

² *Ante* pp 221-228.

³ Code Civ. Pro., § 2899.

⁴ 1 Cow. Tr., 556; *Millard v. Camfield*, 5 Wend., 61.

⁵ Code Civ. Pro., § 2900.

therefor ; and the defendant may be ordered to be discharged after judgment, if the plaintiff fails to take out execution within one hour after he is entitled thereto ; but his discharge for that reason would not affect the execution.¹ If an order for the discharge of defendant is properly made, the constable having him in charge may release him from custody, even before the order is served upon him.² Ordinarily, however, he should not make the release until the order is regularly served upon him. A discharge from arrest before judgment, does not in any way affect the justice's jurisdiction in the action.³ A privileged person is entitled to be discharged from arrest, by the order of the justice before whom he is brought, upon proof, by affidavit, of the facts entitling him to a discharge ; or he may apply for and obtain an order for his discharge, upon like proof, presented to the Supreme Court, or a judge thereof ; or to the county judge of the county, or a judge of the superior city court of the city where the arrest was made.⁴

Adjournment.—An arrested defendant who procures an adjournment in the action, must continue, during the time of the adjournment, in the custody of the constable ; unless he gives an undertaking to the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the plaintiff recovers judgment in the action, and if an execution is issued thereupon against the person of the defendant, within ten days after the plaintiff is entitled to the same ; and if a return is made thereto, on or after the return day thereof, that the defendant cannot be found ; the sureties will pay to the plaintiff the amount due upon the judgment. If such an undertaking is given, the defendant must be discharged from custody.⁵ If the trial of the action is adjourned with the consent of both parties, or upon the application of the plaintiff, the defendant must be discharged from custody.⁶ If the defendant remain in the custody of the constable, he may permit him to go at large, provided he have him on the adjourned day. If, for any reason, other than death, or other unavoidable event, the

¹ Code Civ. Pro., § 2901, 2902.

² *Richmond v. Prain*, 24 Hun, 578.

³ Code Civ. Pro., § 2902.

⁴ Code Civ. Pro., §§ 2904, 564.

⁵ Code Civ. Pro., § 2963.

⁶ Code Civ. Pro., § 2964.

happening of which would have been as certain had the constable continued him in custody, the prisoner is not in court on the adjourned day (as where, in the meantime, he was arrested on a criminal charge), the constable will be liable to the plaintiff for a voluntary escape.¹ While the defendant is in the constable's custody, he may confine him in his house, or, with the sheriff's leave, in the jail. In fact, he may, in his discretion, take any *reasonable* means to secure the defendant's being in custody, and forthcoming on the adjourned day. Although the Code directs the officer to take the defendant *forthwith* to the justice, yet it is intended *only* that he should take him by the nearest and most direct route, and at the soonest convenient time. He may detain him over night, where the arrest is made too late to take him before the justice that night, and give the plaintiff reasonable notice of the fact. The constable may, too, reasonably indulge the defendant, by going with him a little out of the direct way to enable him to see his family, or to procure necessary clothing.

SECTION IV.

ATTACHMENT.

Form and Contents of Warrant.—The warrant of attachment must be granted by the justice who issues the summons, at the time when the summons is issued; and it must be indorsed thereupon, or annexed thereto. It must be subscribed by the justice, and must briefly recite the ground of the attachment.² The constable must see that the war-

¹ *Olmstead v. Raymond*, 6 Johns., 62; *Arnold v. Steeves*, 10 Wend., 514.

² First part of § 2907, Code Civ. Pro. The ground of the attachment is the cause of action, and one of the facts required by section 2906 of the Code as to the facts or *status* of the defendant. Sections 2905 and 2906 are as follows, respectively:

“In an action brought before a justice of the peace, a warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as prescribed in this article, where the action is brought upon a judgment, or to recover for one or more of the following cases: 1. Breach of a contract, express or implied. 2. Wrongful conversion of personal property. 3. Any other injury to personal property, in consequence of negligence, fraud, or other misconduct.”

“To entitle the plaintiff to such a warrant, he must show, by affidavit, to

rant is sufficient on its face; that a proper ground for the attachment is recited therein. The warrant must require the constable, to whom the summons is delivered, to attach, on or before a day specified therein, which must be at least six days before the return day of the summons, and safely to keep, as much of the defendant's goods and chattels within his county, as will satisfy the plaintiff's demand, with the costs and expenses, and to make return of his proceedings thereon to the justice, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit.'

2. *Warrant, how Executed.*

The constable, to whom the warrant of attachment is delivered, must execute it at least six days before the return day of the summons, by levying upon and taking into his custody so much of the goods and chattels of the defendant, not exempt from levy and sale by virtue of an execution, including money and bank notes, which he finds within his county, as will satisfy the plain-

the satisfaction of the justice, as follows: 1. That a sufficient cause of action exists against the defendant, to recover damages for one or more of the causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him. 2. That the defendant is either a foreign corporation, or not a resident of the State; or, if the defendant is a natural person, and a resident of the State, that he has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the county where the defendant, being a natural person, last resided, or, being a corporation, last kept its principal office, or, from the county in which the action is brought, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent; or that the defendant, being a natural person of full age, and a resident of the State, has been continuously without the United States for the space of six months or more, immediately before the application, and either that he has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act, or that service upon the person so designated cannot be made, with due diligence, in the county where the person making the designation resides."

"The affidavit must be filed with the justice, when the warrant is granted."

¹ Code Civ. Pro., § 2907.

tiff's demand, with the costs and expenses. He must safely keep the property attached, to be disposed of as hereinafter detailed, and must immediately make an inventory thereof, stating therein the estimated value of each article or item.¹

Service of Summons and Warrant.—The constable must, immediately after making the inventory, and at least six days before the return day of the summons, serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a copy of each, if he can, with reasonable diligence, be found within the county; or if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county, with a person of suitable age and discretion; or, if such a person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, enclosed in a sealed postpaid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the property is found.²

Undertaking by Defendant.—The defendant, or his attorney or agent in his behalf, may at any time before judgment is rendered in the action, execute and deliver to the constable an undertaking to the plaintiff, in a sum specified therein, at least twice the value of the property attached, as stated in the inventory; with one or more sureties, approved by the constable, or by the justice who issued the warrant; and to effect that, if judgment is rendered against the defendant, and an execution is issued thereupon, within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the constable must redeliver the property to the defendant.³

Claim and Bond by Third Person.—If a person, not a party to the action, claims any property attached, which is not reclaimed by the defendant, as above provided, he may, at any time after the seizure, and before execution is issued upon a judgment rendered in the action execute, and file

¹ Code Civ. Pro., § 2909.

³ Code Civ. Pro., § 2911.

² Code Civ. Pro., § 2910.

with the justice, a bond to the plaintiff, with one or more sureties, approved by the constable or by the justice, in a penalty at least twice the value of the property claimed; and conditioned that, in an action upon the bond, to be commenced within three months thereafter, the claimant will establish that he was the *general*¹ owner of the property claimed, at the time of the seizure; or if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The constable must thereupon deliver the property claimed to the claimant.²

The powers, duties and liabilities of the constable in executing an attachment, are the same as on making a levy by the sheriff or other officer under an execution against property, except where the Code as above detailed grants a different or further power, or imposes other duties. His liability for safe custody of the property taken is the same.³ Though a bond is given as above provided, the goods taken are still in the custody of the law and cannot be levied upon or attached by another officer.⁴

3. *Return of Warrant.*

The constable executing the warrant of attachment must, at the time when and the place where it is returnable, make a return thereto, under his hand, stating all his proceedings thereupon. He must deliver to the justice, with the return, each bond or undertaking delivered to him, as above provided, and a certified copy of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and, *if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor, and the name of the person to whom the copy was delivered, unless his name is unknown to the constable; in which case the return must describe him so as to identify him, as nearly as may be.*⁵

¹ *Pierce v. Kingsmill*, 25 Barb., 631.

² Code Civ. Pro., § 2912

³ *Ante* p. 267.

⁴ *Van Loan v. Kline*, 10 Johns., 129; *Sterling v. Welcome*, 20 Wend., 238.

⁵ Code Civ. Pro., § 2915. If an attachment be as appears by the return, regularly served, the justice has jurisdiction, though the return be false. *Case v. Redfield*, 7 Wend., 398.

4. *Execution where Summons is not Personally served.*

Where the defendant has not appeared, and the summons has not been personally served upon him, and the property of the defendant has been duly attached by virtue of a warrant, which has not been vacated, the justice must proceed to hear and determine the action; and the execution issued on the judgment rendered therein, must require the constable to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property.¹

5. *To Detain Canal Boat.*

When any suit shall be prosecuted before a magistrate for a penalty or forfeiture incurred by reason of the taking by a person upon a canal boat or float, without right, any rails, boards, planks, staves, fire wood or fencing posts from the banks or vicinity, the magistrate issuing the process commencing the suit, by a clause to be inserted therein, may direct the officer executing the same, to detain such boat or float, and the furniture and horses belonging thereto, until the suit shall be determined, or until adequate security shall be given for the payment of any judgment that may be recovered. If such security shall be given, or the defendant in such suit shall prevail, the magistrate shall order the boat, or other float, and the property detained to be released; but if no such security shall be given, and a judgment shall be recovered for such penalty or forfeiture, and the same, together with the costs, shall not be immediately paid, an execution shall be issued, under which the property so detained may be sold, in like manner, as if the judgment had been obtained against the owner thereof.²

The constable should not take the security until it is approved by the justice. The process, like an ordinary summons, is returnable not less than six nor more than twelve days from its issuance by a justice of the peace. To authorize the detention the copy of process should have indorsed upon it a general reference to the statute, in the

¹ Code Civ. Pro., § 2918.

² 1 R. S. (5th ed.), 628, §§ 290-294; id. (6th ed.), 697, §§ 340-344; id. (7th ed.), 685, §§ 169-173.

following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section of the statute, accordingly as the action is brought for a penalty or a forfeiture.¹ The defendant should not be detained unless an order of arrest is attached to the process or indorsed upon it.

SECTION V.

REPLEVIN.

1. *Requisition; and how Procured.*

When Action for a Chattel may be Brought in Justice's Court.—An action to recover a chattel, with or without damages for the wrongful taking, withholding, or detention thereof, can be brought before a justice of the peace of the county in which the chattel is found, in a case, and subject to the qualifications, specified in sections 1689, 1690, 1691 and 1692, and subdivision seventh of section 2862 of the Code of Civil Procedure.²

Affidavit.—The plaintiff may, at the time when the summons is issued, but not afterwards, require the chattel to be replevied, as hereinafter shown. For that purpose, he must deliver to the justice an affidavit and an undertaking, similar in all respects, to the affidavit and undertaking required to be delivered to a sheriff, as prescribed in sections 1695, 1697, 1699 and 1712 of the said Code, except that the sureties in the undertaking must be approved by the justice.³

Requisition.—Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition, subscribed by him, requiring the constable, to whom the summons is delivered, to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days

¹ Code Civ. Pro., § 1897.

² Code Civ. Pro., § 2919. Subdivision 7 of section 2862, limits the jurisdiction of the justice to cases, where the value of the chattel, or of all the chattels, as stated in the affidavit made on the part of the plaintiff, does not exceed \$200.

³ Code Civ. Pro., § 2920. See *ante*, pp. 284–286, 291.

before the return day of the summons. The affidavit and requisition must be delivered to the constable, with the summons.¹

2. *Requisition, how Executed.*

Service of Summons.—The constable must execute the requisition, as a sheriff is required to execute a requisition, in an action brought to recover a chattel, as prescribed in sections 1700, 1701 and 1702 of the Code of Civil Procedure,² except that he must serve the summons, affidavit and requisition, within the time and in the manner prescribed by section 2910 of said Code, for the service of a summons, warrant of attachment, and inventory.³

Constable's Return.—The constable must, on or before the return day of the summons, make a return to the requisition, under his hand, stating all his proceedings thereupon; and file it, with the affidavit and requisition, with the justice. The return must state the manner in which the summons, affidavit and requisition were served, and, if they were served otherwise than by delivering the requisite copies to the defendant personally, the reason therefor, and the name of the person to whom the copies were delivered, unless his name is unknown to the constable; in which case the return must describe him so as to identify him as nearly as may be.⁴

Proceedings when Sureties Excepted to.—At any time after the chattel has been replevied, and at least two days before the return day of the summons, the defendant, unless he requires a return of the chattel, may serve upon the plaintiff, or upon the constable, a written notice that he excepts to the plaintiff's sureties, otherwise he is deemed to have waived all objections to them. If such a notice is served, the sureties must justify upon the return of the summons; or the plaintiff must then give a new undertaking, to the same effect as the original undertaking, with other sureties, who must then appear and justify before the justice.⁵

Proceedings Upon Reclamation of Chattel.—At any time

¹ Code Civ. Pro., § 2921.

⁴ Code Civ. Pro., § 2923.

² See *ante*, pp. 286, 287.

⁵ Code Civ. Pro., § 2924.

³ Code Civ. Pro., § 2922.

before the return day of the summons, the defendant may, if he does not except to the plaintiff's sureties, serve upon the justice a notice that he requires the return of the chattel replevied. With the notice he must deliver to the justice an affidavit and an undertaking, similar, in all respects, to those required to be given by a defendant upon requiring a return of a chattel, as prescribed in sections 1704 and 1712 of the Code of Civil Procedure, omitting the provision in the undertaking, "or if the action abates in consequence of the defendant's death." The sureties in the undertaking must justify before the justice upon the return of the summons. If the plaintiff has stated separately, in his affidavit, the value of one or more chattels or classes of chattels, as prescribed in section 1697 of said Code, the defendant may require a delivery of part of the property replevied, as prescribed in that section.¹ Except as otherwise expressly prescribed, the examination and qualifications of the sureties, and the allowance of the undertaking, upon a justification as above specified, must be the same as upon a justification of bail, as prescribed in sections 579, 580 and 581 of the Code of Civil Procedure, substituting the justice for the judge; but after such allowance, the undertaking must be filed with the justice. The constable is thereupon exonerated from liability.²

When and to Whom Property to be Delivered.—If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose, or if he fails to procure the allowance of his undertaking, or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking, the constable must, except in the case specified in section 2929 of the Code of Civil Procedure, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, fails to procure the allowance of his undertaking, or if the defendant, after he has required the return of the chattel, procures the allowance of his undertaking, the constable must immediately deliver the chattel to the defendant.³ A constable who de-

¹ Code Civ. Pro., § 2925.

² Code Civ. Pro., § 2926; and see *ante*, p. 241.

³ Code Civ. Pro., § 2927.

livers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in section 2927 of the said Code, or, by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of \$100; and is also liable to him for all damages which he sustains thereby.¹ The provisions, regulating the proceedings, where a person, not a party, claims property which has been replevied, and the rights of such a person, and of the sheriff, as prescribed in sections 1709, 1710, 1711 and 1712 of the said Code, apply to a like case in an action of replevin in justice's court, substituting the constable for the sheriff;² except that service of a notice and of a copy of the claimants affidavit, upon the plaintiff's attorney, as prescribed in said section 1709, must be made, either upon the plaintiff, personally, or upon the attorney who appears for him before the justice; and that the sum specified in the undertaking, given by the plaintiff to the constable, need not exceed, in any case, \$300.³

Proceedings in the Action; and in Action Upon Undertaking.—Section 1373,⁴ section 1731, excluding subdivision first thereof, and sections 1722, 1726, 1730, 1732, 1733, 1734 and 1735 of the Code of Civil Procedure,⁵ substituting the constable for the sheriff, apply to the proceedings in an action in a justice's court to recover a chattel, and to an action against the sureties in an undertaking given therein, except as otherwise specially prescribed as above.⁶

SECTION VI.

SUBPŒNA.

A Constable may Serve any subpœna, issued by a court of record or not of record, or by any board or officer authorized to issue subpœnas, either in a civil or in a criminal action or proceeding.

1. *When a Justice may Issue a Subpœna.*

A justice of the peace may issue a subpœna, to compel a

¹ Code Civ. Pro., § 2928.

² *Ante*, pp. 290, 291.

³ Code Civ. Pro., § 2929.

⁴ *Ante*, p. 303.

⁵ *Ante*, pp. 293, 294.

⁶ Code Civ. Pro., § 2931.

witness to attend, in the county where the justice resides, or in an adjoining county, but not otherwise, for the purpose of testifying upon the trial of an action, pending before himself, or before another justice. The subpœna may require the witness, except as otherwise expressly prescribed by law, to bring with him any book or paper, relating to the merits of the action.¹

Subpœna, how Served.—A subpœna so issued, may be served by a constable, or by any other person. It must be served by reading it, or stating its contents, to the witness, and by paying or tendering to him his lawful fee for one day's attendance as a witness. Where it is served by a constable, his return thereto, stating the manner of service and the sum paid, is presumptive evidence of the facts therein stated.²

2. Attachment Against Defaulting Witness.

When Issued.—Where it is made to appear, to the satisfaction of the justice, by affidavit or other proof, that a person, duly subpœnaed to attend before him in an action, has refused or neglected to attend as a witness in obedience to the subpœna, and no just cause for the neglect or refusal is shown to exist; and the party, in whose behalf the witness was subpœnaed, or his attorney, makes oath that the testimony of the witness is material; the justice must issue a warrant of attachment, directed generally to any constable of the county, for the purpose of compelling the attendance of the witness.³

Attachment, how Executed.—Such a warrant of attachment must be executed in the same manner as an order of arrest.⁴ The fees of the justice and constable for issuing and serving it, must be paid by the person against whom it is issued, unless he shows a reasonable excuse, to the satisfaction of the justice, for his omission to attend; in which case, the party procuring the warrant must pay them, and, if he recovers costs, the amount thereof must be allowed him as a part of his costs.⁵ Where the delinquent witness

¹ Code Civ. Pro., § 2969.

⁴ *Ante*, pp. 228-235.

² Code Civ. Pro., § 2970.

⁵ Code Civ. Pro., § 2972.

³ Code Civ. Pro., § 2971.

is within an adjoining county, the constable, to whom the warrant of attachment is directed, may arrest a witness in that county, and bring him before the justice. The constable, while he is within the adjoining county for that purpose, has all the powers of a constable of that county, with respect to the warrant so issued to him.¹

3. *Fine, and how Imposed.*

Fine.—A person, duly subpoenaed as a witness, who, without a reasonable excuse, proved by his oath or the oath of another person, fails to attend, or, attending, refuses to testify, must be fined by the justice before whom the action is pending, for each non-attendance or refusal, such a sum, not less than one dollar nor more than ten dollars, as the justice thinks it reasonable to impose upon him as a fine therefor.²

How Imposed.—The fine may be summarily imposed by the justice, upon the application of the party in whose behalf the witness was subpoenaed, at any time during the trial when the defaulting witness is present, and has an opportunity to be heard. If it is not imposed during the trial, the justice, at any time within five days after judgment is rendered, must, upon the application of the party, issue a warrant, directed generally to any constable of the county, commanding him to arrest the defaulting witness, and to bring him before the justice, at a time and place therein specified, the time to be not more than twelve days after issuing the warrant, to show cause why a fine should not be imposed upon him.³

How Collected.—If the whole amount of the fine and costs is not forthwith paid to the justice, he must issue an execution, directed generally to any constable of the county, commanding the constable to collect the sum remaining unpaid, of the goods and chattels of the delinquent, within the county, and, for want thereof, to take him, and convey him to the jail of the county, there to remain until he pays that sum, not exceeding thirty days. Upon the delinquent being committed to jail, the keeper

¹ Code Civ. Pro., § 2973.

³ Code Civ. Pro., § 2975.

² Code Civ. Pro., § 2974.

thereof must keep him in close custody therein, until he is entitled to a discharge, as specified in the execution.¹

4. *Powers of Commissioners.*

Where the commission to take testimony in an action in a justice's court is executed within the State, the commissioner, or, if there are two or more, a majority of them, have the same power to issue a subpoena, to swear a witness, and to compel his attendance, that a justice of the peace has, in an action pending before him.²

As to the service of subpoenas, issued by the board of supervisors of any county, or by another board or officer in a civil case, see Part I, Sheriffs.³

SECTION VII.

TRIAL AND ITS INCIDENTS.

1. *Venire.*

When and how Issued.—Where a trial by jury is duly demanded, the justice must issue a venire, directed generally to any constable of the county wherein the action is to be tried, commanding him to notify twelve men of the town or city where the justice resides, qualified to serve, and not exempt from serving, as trial jurors in courts of record; not of kin to the plaintiff or defendant; and not interested in the action; to attend before the justice, at a time and place specified therein, to form a jury for the trial of the action. But if the parties agree upon a number of jurors, less than six, to try the action, the venire must direct the constable to notify twice the number so agreed upon.⁴ Where the action is between two towns or cities, or between a town and a city, the venire must direct the constable to notify twelve men of the county, who are qualified and not exempt, and who are not interested in the matter at issue, to form a jury for the trial of the action.⁵

Delivery, Execution and Return of Venire.—The justice must deliver the venire, or cause it to be delivered, to a con-

¹ Code Civ. Pro., § 2977.

⁴ Code Civ. Pro., § 2291.

² Code Civ. Pro., § 2987.

⁵ Code Civ. Pro., § 2992.

³ *Ante*, pp. 204-209.

stable of the county, disinterested between the parties, who has not acted, or been employed to act, as the attorney or agent of either party, with respect to any claim or matter in controversy in the action, and to whom neither party offers any other reasonable objection. The constable shall not notify any person, whom he has reason to believe to be biased or prejudiced, in favor of or against either party; and he must, in all other respects, execute the venire fairly and impartially. *He must notify the jurors personally* (stating to each of them the title of the action, the time and place of trial, and that he is summoned as a juror), and indorse upon or annex to the venire, and deliver to the justice, a return under his hand, containing a list of the persons notified.¹ For the statutes concerning the qualifications of jurors, and the exemptions from jury duty, see Part I of this work.²

Procuring Trial Jury.—For the purpose of procuring a jury to try the action, the justice must prepare, or cause to be prepared, ballots, uniform, as nearly as may be, in appearance, by writing the name of each person returned, who attends, upon a separate piece of paper. The constable, in the presence of the justice, must roll up or fold each ballot in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a box, or other convenient receptacle.³ The justice must then openly draw out, one after another, six of the ballots, or such smaller number thereof as the parties have agreed upon. If a person, whose name is drawn, is challenged and set aside, or is excused, another ballot must be drawn; and so on successively, until the required number of persons is obtained. Those persons constitute the jury to try the action.⁴ If a sufficient number of competent jurors is not drawn, the justice may, in his discretion, either issue a new venire, or direct the constable to require the attendance of such a number of talesman from the bystanders, or others, duly qualified, and against whom no cause of challenge appears, as the justice deems sufficient for the

¹ Code Civ. Pro., § 2993.

² See *ante*, pp. 80–83; Code Civ. Pro., §§ 1027–1034.

³ Code Civ. Pro., § 2994.

⁴ Code Civ. Pro., § 2995.

purpose.¹ If the constable, to whom the venire is delivered, does not return it as required thereby; or if a full jury is not obtained in the manner stated, the justice must issue a new venire.²

2. *Contumacious Witness.*

When Committed to Jail.—Where a witness, attending before a justice in an action, refuses to be sworn or affirmed in the form prescribed by law; or to answer a pertinent and proper question; or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce, as prescribed in section 2969 of the Code of Civil Procedure,³ or duly required to produce by an order, made as prescribed in section 867 of said Code; and the party, at whose instance he attended, makes oath that the testimony of the witness, or that the book or paper, is so far material, that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county.⁴ The warrant must specify the cause for which it is issued. If it is issued for refusing to answer a question, the question must be specified therein; if for neglecting or refusing to produce a book or paper, the same must be described with convenient certainty. The recusant witness must be closely confined, by virtue of the warrant, until he submits to be sworn or affirmed, or to answer, or to produce the book or paper required, as the case may be; or is otherwise discharged according to law.⁵

3. *Jury, how Kept.*

After hearing the allegations and proofs, the jury must be kept together in a private and convenient place, under the charge of a constable, until they all agree upon their verdict; and for that purpose, the justice shall administer to the constable the following oath: "You swear in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors upon this trial together, in a private and convenient place, without any meat or drink, except such as shall be ordered by me; that you

¹ Code Civ. Pro., § 2996.

² Code Civ. Pro., § 2997.

³ Code Civ. Pro., § 3001.

⁴ *Ante*, p. 209.

⁵ Code Civ. Pro., § 3002.

will not suffer any communication to be made to them, orally or otherwise; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they are discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed upon."¹ When the jurors have agreed upon their verdict the constable should inform the justice of that fact, and present the jury before him. It is not necessary to notify either party.² Where the justice is satisfied that the jurors cannot agree upon a verdict, after having been out a reasonable time, he may discharge them and issue a new venire, returnable within forty-eight hours; unless the parties consent that he should determine the case on the evidence.³

4. *Defaulting Juror, how Punished.*

A person duly notified to attend as a juror, who fails to attend, or, attending, refuses to serve, without a reasonable excuse, proved by his oath, or the oath of another person, is liable to the same fine, to be imposed and collected, with costs, in like manner, and applied to the same use, as is prescribed with respect to a person subpoenaed as a witness in a civil action before a justice of the peace, and not attending, or, attending and refusing to testify.⁴

SECTION VIII.

EXECUTIONS.

1. *When Justice may Issue or Renew.*

At any time within five years after entry of a judgment, the justice of the peace who rendered it, *being in office*, may issue an execution thereupon, unless it has been docketed in the county clerk's office.⁵ After the return, wholly or partly unsatisfied, of an execution, issued by a justice of the peace, he may, from time to time, within five years

¹ Code Civ. Pro., § 3006.

² Code Civ. Pro., § 3007.

³ Code Civ. Pro., § 3008.

⁴ Code Civ. Pro., § 3009.

⁵ Code Civ. Pro., § 3024.

after the judgment was rendered, issue a new execution, or renew the former execution. An execution is renewed by a written indorsement thereupon to that effect, signed by the justice, and dated upon the day when it was made. If part of the execution has been satisfied, the indorsement must state the sum remaining due. Each indorsement renews the execution for sixty days from the date thereof. A justice whose term of office has expired may thus issue or renew an execution.¹ It should be noticed *that a justice who has gone out of office cannot issue an execution, where a previous execution has not been issued and returned.*

2. General Requisites of Execution.

An execution, issued by a justice, must be directed generally to any constable of the same county. It must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the name of the justice by whom, the judgment was rendered; and it must be made returnable to the justice, within sixty days after its date.²

Form of, on Money Judgment.—An execution, issued upon a judgment for a sum of money, must specify, in the body thereof, the sum recovered, and the sum actually due upon the judgment at the date of the execution; and, except in a case where special provision is otherwise made by law, it must, substantially, require the constable to satisfy the judgment, together with his fees, out of the personal property of the judgment debtor within the county, not exempt from levy and sale by virtue of an execution; and to bring the money before the justice, by the return day of the execution, to be rendered by the justice to the party who recovered the judgment. If the judgment was recovered against a male person, in either of the actions specified in subdivision first or second of section 2895 of the Code of Civil Procedure; or if an order of arrest was granted, and was executed, in a case specified in subdivision third of that section, the execution must also command the constable, if sufficient personal property cannot be found to satisfy the

¹ Code Civ. Pro., § 3027.

² Code Civ. Pro., § 3025.

judgment, to arrest the judgment debtor, and to convey him to the jail of the county, there to remain until he pays the judgment, or is discharged according to law. If the judgment was rendered in an action to recover a penalty or forfeiture given by a statute of the State, the justice must indorse upon the execution a reference to the statute as prescribed in section 1897 of said Code,¹ with respect to a copy of the summons.²

3. *Exemption.*

The same personal property is exempt from levy and sale, by virtue of an execution issued by a justice of the peace, which is exempt from levy and sale by virtue of an execution issued out of the Supreme Court, and in the like cases, and under the same circumstances, as prescribed in sections 1389, 1390, 1391, 1392, 1393 and 1394 of the Code of Civil Procedure, and the other special provisions of law, relating to such an exemption.³ The question of exemption is a statutory privilege, and is strictly personal; it will not, therefore, avail a constable as a defense to an action for a neglect to levy. *Prima facie* all property is liable to execution. And an officer having an execution against the owner, should levy upon it, and, unless an exemption is claimed, should sell it.⁴

4. *Levy and Sale.*

Indorsement of Levy and Notice of Sale.—A constable who takes personal property into his custody by virtue of an execution, must indorse upon the execution the time of levying upon it.⁵ But his omission so to do, is not fatal to the levy. The provision of the Code is directory merely.⁶ He must immediately post conspicuously, in at least three public places of the city or town, in which the property was taken, written or printed notices, signed by him, describing the property, and specifying the place within the

¹ *Ante*, p. 203.

² Code Civ. Pro., § 3026.

³ Code Civ. Pro., § 3028, *ante*, pp. 309-323.

⁴ *Baker v. Brintnall*, 52 Barb., 188; *Smith v. Hill*, 22 id., 656; *Mickes v. Tousley*, 1 Cow., 114; *Earl v. Camp*, 16 Wend., 563.

⁵ Code Civ. Pro., § 3029.

⁶ *Havens v. Gordon*, 5 Hun, 178.

same city or town, where, and the time, not less than six days after the posting, when, it will be exposed for sale.¹

Mode of Levy and Sale.—The provisions of sections 1384, 1385, 1386, 1387, 1405, 1409, 1410, 1411, 1412 and 1428 of the Code of Civil Procedure,² substituting the constable for the sheriff, apply to and govern the levy upon and sale of personal property, by virtue of an execution issued by a justice of the peace, except where a different rule is herein stated.³

A constable has such an interest in property upon which he has levied by virtue of executions, as will enable him to maintain an action to recover possession thereof.⁴ Whatever may have been the irregularity or imperfection of the proceedings before the justice, the constable, having executions therein issued, valid on their face, and issuing from a competent authority, is bound to execute them;⁵ even if he knew of the facts which render the proceedings void.⁶ Having actual possession of property under such executions, he may maintain an action against one who disturbs his possession, without showing the judgment.⁷ But the defendant may show the invalidity of the judgment; and if he can, also, in any wise so connect himself with the actual title, as to show in him a special property in the goods.⁸ Indeed it would seem that if the officer suing, content himself with showing merely an execution valid on its face, the defendant may show an apparent right to the possession of the goods in himself; and, *then*, the officer must show valid judgment to sustain his execution. Though process valid on its face is a protection to the officer, it is not sufficient, as against one showing any right whatever to the goods, for the maintenance of an action to recover property levied

¹ Code Civ. Pro., § 3029.

² *Ante*, pp. 334–357.

³ Code Civ. Pro., § 3030.

⁴ *Rue v. Perry*, 63 Barb., 40.

⁵ *Savacool v. Boughton*, 5 Wend., 171; *Clearwater v. Brill*, 4 Hun, 728; reversed on another point, 63 N. Y., 627.

⁶ *People v. Warren*, 5 Hill, 440.

⁷ *Spoor v. Holland*, 8 Wend., 445. *Barker v. Miller*, 6 Johns., 195; *Blackley v. Sheldon*, 7 id., 32; *Coon v. Congden*, 12 Wend., 495; *Parker v. Walrod*, 16 Wend., 514.

⁸ *Clearwater v. Brill*, 63 N. Y., 627; rev'g S. C., 4 Hun, 728.

upon, or damages for the conversion of the same.¹ And if the defendant show color of title, or of right to the possession, the plaintiff cannot attack his title or possession, unless he show a valid judgment on which the execution under which he claims, was issued.² Where a sheriff, or his deputy, has made a valid levy under an execution and taken the property into his possession, a constable, to whom executions against the same defendant are subsequently issued by a justice of the peace, cannot make any levy on such property, nor can he sell the same subject to the levy made by the sheriff.³

A constable who is unable, by reason of sickness, to take charge of and sell property upon which he has levied, may turn over the property and execution to another constable of his township.⁴ Generally, however, the constable commencing the execution of process should finish the same. The service of a writ of execution duly commenced by a constable may be completed by him after the expiration of his term of office.⁵

Return of Execution.—The constable must return the execution to the justice, and pay to him the amount of the judgment, with interest, or so much thereof as he has collected; returning the surplus, if any, to the person from whose property it was collected.⁶ And the constable, when he receives an execution, should mark upon it the time of receipt; not only does the Code require this to be done by a sheriff;⁷ but the personal property of the judgment debtor is bound from the time of the receipt of the execution, by the officer, for collection.⁸ If the defendant requests it, the constable should also deliver to him a copy of the execution,

¹ *Clearwater v. Brill*, *supra*; *Rue v. Perry*, 63 Barb., 40; *Horton v. Hender-shot*, 1 Hill, 119; *Dunlap v. Hunting*, 2 Denio, 643, 645; *Earl v. Camp*, 16 Wend., 562.

² *Clearwater v. Brill*, *supra*; *Thatcher v. Maack*, 7 Ill., App., 635; *Gates v. Neimeyer*, 54 Iowa, 110; *Bean v. Loftus*, 48 Wis., 371.

³ *Seymour v. Newton*, 17 Hun, 30.

⁴ *Evans v. Thurston*, 53 Iowa, 122; *Freudenstein v. McNier*, 81 Ill., 208.

⁵ *O'Brien v. Annis*, 120 Mass., 143.

⁶ Code Civ. Pro., §§ 3031, 102; *ante*, pp. 209, 188.

⁷ *Ante*, p. 295; Code Civ. Pro., § 1363.

⁸ Code Civ. Pro., § 1405.

without compensation.¹ When sued for neglect to return, the constable may show by parol that he has returned the execution as the law requires.²

5. *Imprisonment of Judgment Debtor.*

For want of sufficient personal property, whereon to levy, the constable must, if the execution requires it, arrest the judgment debtor, and convey him to the jail of the county.³ He should there deliver the defendant, and the execution to the jailer or his deputy, taking a receipt, both for the debtor arrested and the execution delivered. For the purpose of a receipt it would be well for the constable to have with him a copy of the execution on which the jailer could make the acknowledgement of the receipt of the person of the defendant, and the process upon which he was arrested. The constable should always take care to see that the process under which he acts is valid on its face, containing all the necessary recitals; especially so when he makes an arrest or seizes property thereunder. If the process is not fair upon its face it is *no* protection to the officer executing it. He is bound first to make a search for property before he arrests the defendant, unless the latter declares he has no property. His right to take the body depends upon the contingency of there being no property to be found. If without searching or inquiring for property, he immediately upon receiving the execution arrests the defendant, he does it at his peril; and if it is shown that the defendant had property in his open and visible possession, which was subject to the execution, and might with reasonable diligence, have been found by the officer, he is undoubtedly liable to an action for making the arrest.⁴ But in an action against a constable for an illegal arrest, the burden of proof lies on the plaintiff, who must show that he had property clearly subject to execution, and that the constable had due notice thereof—without such proof the law will presume that the officer did his duty.⁵

¹ Code Civ. Pro., § 101.

² *James v. Hartney*, 6 Hill, 487.

³ Code Civ. Pro., § 3032.

⁴ *Hollister v. Johnson*, 4 Wend., 639.

⁵ *Barhydt v. Valk*, 12 Wend., 145.

The manner in which a debtor, imprisoned on a justice's execution, may procure his discharge has already been detailed.¹ Notwithstanding such discharge, the judgment remains valid as against his property; and a new execution may be issued accordingly, as if he had not been imprisoned.² As to what amounts to an escape, see *ante*, p. 550, *et seq.*

6. *Execution in an Action for a Chattel.*

In an execution for a chattel, the possession of which has not been delivered to the prevailing party, an execution, for the delivery of the possession thereof to him, as well as for any damage recovered by him, may be issued by the justice unless the judgment has been duly docketed in the county clerk's office. It must be to the same effect, and executed in the same manner, as a like execution issued upon a judgment rendered in the Supreme Court;³ except that it must be directed generally to any constable of the county; and that the direction to satisfy a sum of money, out of the property of the judgment debtor, must be in the form prescribed for a like direction, where an execution is issued by a justice of the peace, upon a judgment for a sum of money.*

7. *Failure to Return Execution; or to Pay Over Moneys Collected.*

Action for Failure to Return.—If a constable fails to return an execution within five days after the return day thereof, the party in whose favor it was issued, may recover, in an action against the constable, the amount of the execution, if it was issued upon a judgment for a sum of money; or if it was for the delivery of the possession of a chattel, the value of the chattel, as specified in the judgment, together with the damages and costs awarded thereby; and, in either case, with interest from the time when the judgment was rendered.⁵

Not to Act Under Execution after Return Day.—A constable shall not levy upon or sell property, or arrest a

¹ *Ante*, pp. 555, 556.

² Code Civ. Pro., § 3037.

³ *Ante*, pp. 293, 294; Code Civ. Pro., § 1731.

⁴ Code Civ. Pro., § 3038; see *id.*, § 3036; *ante*, p. 679.

⁵ Code Civ. Pro., § 3039; *id.*, § 102.

defendant, or take possession of a chattel, by virtue of an execution, after the time limited therein for its return, unless the execution has been renewed; nor shall he do any act under a renewed execution, after the expiration of the time for which it has been renewed.¹ Any renewal must be in proper statutory form, or the constable acting under it will be a trespasser.²

Action for Money Collected.—Where money, collected by a constable upon an execution, is not paid over by him according to law, any person entitled thereto may maintain an action in his own name, upon the instrument of security given by the constable and his sureties; and may recover therein the sum so collected, with interest from the time when it was collected.³

8. *Duty after Term of Office has Expired.*

A constable to whom an execution is delivered, whose term of office has expired on or before the return day thereof, must proceed thereupon in the same manner, as if his term of office had not expired; and he and his sureties are liable for any neglect of duty, with respect to the execution; or for money collected thereunder, or for damages sustained by reason of any act done by the constable, touching the execution, in the same manner, and to the same extent, as if his term of office had not expired.⁴

9. *When Appeal is Taken.*

If, after an execution is issued upon a justice's judgment, an appeal is taken in the action, and a copy of the undertaking, certified by the justice, or his clerk, or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed (or, where the justice is dead, or cannot be found within the county, a copy of the undertaking certified by the clerk of the county, showing the undertaking to have been filed in his office⁵), is served upon the constable holding the execution, all further pro-

¹ Code Civ. Pro., § 3040.

² Code Civ. Pro., § 3027.

³ Id., § 3041.

⁴ Id., § 3042.

⁵ Id., § 3052.

ceedings thereunder are stayed.¹ If the appeal be brought for a new trial in county court, the judgment of the justice, after ten days from the filing of the justice's return in the appellate court, is a nullity, and any levy made should, after that time, be relinquished.² But if no new trial is desired in county court a levy made prior to the stay should be retained until the decision of the appeal. The constable may, after the copy undertaking is served upon him, either take goods previously levied upon into his actual custody, or take a receiptor for them. The same rules would apply as to the arrest of the defendant, or as to anything done under and by virtue of the execution.

10. *Execution Against Joint Debtor.*

An execution upon a judgment against joint debtors must be issued, in form, against all the defendants; but the justice should indorse upon the execution a direction to the constable, containing the name of each defendant, who was not summoned, and restricting the enforcement of the execution so that it cannot be enforced against the person or the sole property of any defendant whose name is so indorsed. The execution may, however, be collected out of personal property owned by such defendant, jointly with the other defendants who were summoned, or with any of them; or it may be collected out of the sole property of any defendant summoned.³ The constable, having the execution for collection, should as carefully observe the restrictions of the indorsement as he would any proper and legal direction in the body of the mandate.

11. *Indemnity.*⁴

An execution plaintiff is under no obligation to give a bond of indemnity to the constable. He is bound to perform his duty according to law without such bond.⁵ But where there is doubt as to the defendant having a leviable interest in property in his possession, or he claims the prop-

¹ Code Civ. Pro., § 3051.

² *Burns v. Howard*, 9 Abb. N. C., 321.

³ Code Civ. Pro., §§ 1934, 1935.

⁴ *Ante*, pp. 347-350.

⁵ *State v. Sandlin*, 44 Ind., 504.

erty as exempt, the constable may demand a bond of indemnity. If it be refused, the constable may return the execution unsatisfied, leaving upon him, however, the burden of showing that the property could not be levied upon. In fact, the constable may demand and accept a bond of indemnity, the same as a sheriff; and his duties and responsibilities with reference to the indemnity are the same as a sheriff's in like circumstances. If there be a claimant of the property, the claim can be tried by a jury called by the constable; and the determination of the jury will affect the liability of the constable, as the liability of the sheriff would, in like case, be affected. If a constable, or other officer, accepts a bond of indemnity, in relation to the collection of an execution, or in the due execution of any process, he is bound to go on and act as instructed. He cannot return the execution unsatisfied, and then show, when sued for a false return, that the property defendant had in his possession was exempt from execution, or that the defendant had no leviable interest therein.¹

It is no defense to an action brought by a constable upon an agreement by the plaintiffs in an execution, to indemnify him against the costs of a suit brought by him against a deputy sheriff for levying upon and selling property which the constable had previously levied on, that when the defendant agreed to indemnify the plaintiff they did not know that he had levied other executions upon the same property levied upon by virtue of theirs.²

SECTION IX.

CONTEMPTS.³

In certain cases a justice of the peace has power to punish for criminal contempts. The cases and the method of punishment have been pointed out in a former part of this work. But a person cannot be punished by a justice of

¹ *Baker v. Brintnall*, 52 Barb., 188; *Evans v. Thurston*, 53 Iowa, 122.

² *Berry v. Hemingway*, 56 Barb., 70.

³ *Ante*, p. 492.

the peace, for a contempt, until an opportunity has been given him to be heard in his defense. And, for that purpose, the justice must issue a warrant, directed generally, to any constable of the county, requiring the constable to bring the offender before him.¹ A warrant of commitment for a contempt, must set forth the particular circumstances of the offense; otherwise it is void." An officer, who collects or receives a fine, imposed by a justice of the peace for a contempt, must, within ten days thereafter, pay the money, for the benefit of the poor, to the overseer or superintendent of the poor of the town, city or district wherein the fine was imposed; or, where there is no such officer, to the officer or officers performing corresponding functions under another name; unless the board of supervisors has directed the payment of fines and penalties to the supervisor of the town, in a case where it is authorized by law so to do.³

SECTION X.

SUMMARY PROCEEDINGS FOR LAND.

Summary proceedings, and the duties of the sheriff, constable or other ministerial officer in regard to the execution of a mandate issued in such proceedings have been discussed, and the statutes and decisions appertaining thereto, have been fully stated in a former part of this work.*

SECTION XI.

ELECTION LAW; AND MILITARY CODE.

The sheriff and constables have concurrent duties relative to the election law; and such duties have already been fully stated.⁵ Under the Military Code there are no duties to be performed by a constable which may not be performed by a sheriff. These duties have also been stated.⁶

¹ Code Civ. Pro., § 2872.

² Code Civ. Pro., § 2574.

³ Code Civ. Pro., § 2875.

⁴ *Ante*, pp. 441-450.

⁵ *Ante*, p. 506.

⁶ *Ante*, pp. 509-513.

SECTION XII.

HIGHWAYS.

1. *Refusal to Perform Labor Upon.*—The justice of the peace to whom complaint shall be made of any refusal or neglect to perform labor upon a highway for which a penalty is prescribed by statute, shall forthwith issue a summons directed to *any constable of the town*, requiring him to summon the delinquent, to appear forthwith before such justice, at some place to be specified in the summons, to show cause why he should not be fined, according to law, for such refusal or neglect; which summons shall be served personally, or by leaving a copy at his personal abode.¹ If, upon the return of such summons, no sufficient cause shall be shown to the contrary, the justice shall impose the fine provided by law for the offense complained of, and shall forthwith issue a warrant under his hand and seal, directed to any constable of the town where such delinquent shall reside, commanding him to levy such fine, with the costs of the proceedings, of the goods and chattels of such delinquent.² The constable to whom such warrant is directed, shall forthwith collect the moneys therein mentioned. He shall pay the fine when collected, to the justice who issued the warrant;³ except that when the delinquent is a corporation, he shall pay over the money to the commissioners of highways of the town.⁴ How personal service may be made upon a corporation has already appeared.⁵ No goods or chattels are exempt from levy and seizure under such warrant. Otherwise, the moneys are collectible in the same manner as are moneys upon an execution in a civil action.

2. *Summoning Juries in Opening or Altering Highways.*

When a jury shall be required to ascertain if a highway or an alteration is necessary and proper, in proceedings to alter or lay out a road without the consent of the owners,

¹ 2 R. S. (5th ed.), 391, § 55; id. (6th ed.), 146, § 61; id. (7th ed.), 1232, § 42.

² 2 R. S. (5th ed.), 391, § 56; id. (6th ed.), 146, § 62; id. (7th ed.), 1232, § 43.

³ 2 R. S. (5th ed.), 391, § 57; id. (6th ed.), 146, § 63; id. (7th ed.), 1232, § 44.

⁴ 2 R. S. (5th ed.), 387, § 33; id. (6th ed.), 142, § 39; id. (7th ed.), 1226, § 4.

⁵ *Ante*, pp. 198–200.

and when the jury shall have been duly certified it shall be the duty of the justice receiving the certificate forthwith to issue a summons to one of the constables of his town, directing him to summon the persons named in said certificate, specifying the time and place, in said summons, at which the persons to be summoned shall meet, which shall not be less than ten nor more than twenty days from the issuing thereof.¹ The certificate should be attached to the summons, and the latter should be directed to one of the constables of the town by name. Such jurors should be summoned the same as jurors in a court of record may be summoned.² That is, the service may be either personal, or by leaving a notice of the selection of any juror, at his place of residence with a person of suitable age and discretion. A personal service is the better, wherever it can be had.

Assessment of Damages.—On the application of the commissioners of highways, or of the owner of the land through which such road is laid out, to any two justices of the peace of the town, they shall issue their warrant to *some constable* of some other town of the same county, neither interested nor of kin to any person interested, in the land through which the road is laid out; directing him to summon twelve disinterested freeholders, residing in some other town than that in which such road is laid out, and not of kin to the owner of such land, to assess the damages sustained by the laying out of such road, and shall therein specify the time and place at which the jury shall meet.³ The jurors in this case should be summoned the same as jurors are summoned in a civil action before a justice of the peace.⁴ It is the duty of the constable to select the jurors himself, without suggestion from the justice, or any other person.

2. *Encroachment Upon Highways.*

If the occupant of land to whom notice is given that his fence encroaches upon a highway, shall, within five days,

¹ 2 R. S. (5th ed.), 398, § 87; id. (6th ed.), 153, § 75; id. (7th ed.), 1240.

² *Ante*, p. 69.

³ 2 R. S. (7th ed.), 1242, § 55.

⁴ See *ante*, pp. 676.

deny such encroachment, the commissioners of highways, or some one of them, shall apply to any justice of the peace of the county for a precept directed to any constable of the town, to summon twelve freeholders thereof, that is, of the same town, to meet at a certain day and place to be specified in such precept, and not less than four days after the issuing thereof, to inquire into the premises. The constable, to whom such precept is directed, shall give at least three days' notice (verbal notice will do) to the commissioners of highways of the town, and to the occupant of the land, of the time and place at which such freeholders are to meet.¹ The manner of selecting and summoning the jury is the same as that for summoning a jury to assess damages on opening a highway, except that in this case the jury is to be obtained from the same town. No one should be selected as a juror, in anywise interested in, or of kin to, the occupant. It is irregular for the justice to annex to the summons a list of jurors to be selected by the constable. But if the irregularity is not objected to, it will be deemed to have been waived.² If the jury find that any encroachment has been made, the occupant of the land must pay the costs of the inquiry; and if the same are not paid within ten days, the justice shall issue a warrant for the collection thereof, in the manner provided for the collection of a penalty for refusing to perform highway labor.³ The justice shall preside upon the inquiry, on which six of the jurors summoned shall be drawn, and all the proceedings shall be had the same as upon the trial of a civil action before said justice.

SECTION XIII.

STRAYS UPON HIGHWAYS.

Precept, how Served.—The precept, in proceedings relative to strays upon highways, must be served upon each of

¹ 2 R. S. (5th ed.), 407, § 143; id. (6th ed.), 165, § 171; id. (7th ed.), 1254, § 105.

² *Mott v. Commissioners, etc.*, 2 Hill, 472.

³ 2 R. S. (5th ed.), 407, § 145; id. (6th ed.), 166, § 173; id. (7th ed.), 1255, § 107.

⁴ Laws of 1862, chap. 243, § 1; 2 R. S. (7th ed.), 1256.

the persons, to whom it is directed by his name, within the same time, and in like manner as a summons is required to be served, as prescribed in section 2910 of the Code of Civil Procedure.¹ Where it is directed generally to all persons, having an interest in the animal or animals seized, it may be served by a constable *of the town*, or by an elector thereof, specially authorized so to do by a written indorsement upon the precept, under the hand of the justices, by posting a copy thereof in at least six public and conspicuous places in the town where the seizure was made, one of which places must be the nearest district school-house; or, if the seizure was made within an incorporated village, having schools in charge of a board of education, a building in which such a school is kept. Each copy must be so posted, within two days after the precept is issued. Where the precept is directed to a person by his name, and proof is made by affidavit, to the satisfaction of the justice, that it cannot, with reasonable diligence, be personally served upon that person, within the county, at least six days before the return day thereof, the justice may, by a written order, direct that service thereof be made, by posting copies thereof at least five days before the return day as above prescribed, in which case service thereof may be made accordingly.²

Proof of Service.—At the place where the precept is returnable, and at the expiration of one hour from the time specified therein, the petitioner must, unless the precept is directed to a person by his name, and he appears, furnish proof of the service of the precept, as above prescribed. If it was served by a constable, either personally or by posting, his written return upon the precept is sufficient proof of the facts relating to the service as stated therein. If it was served by a private person, proof of service must be made by affidavit.³

Warrant to Sell.—If, upon the return of the precept, and after waiting the allotted time, no person appears and answers, or if the decision of the justice, or the verdict of the jury, where the issues were tried by a jury, is in favor

¹ See *ante*, p. 666.

³ Code Civ. Pro., § 3089.

² Code Civ. Pro., §§ 3088, 3109.

of the petitioner, the justice must make a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as the law prescribes. Thereupon the justice must issue a warrant, under his hand, directed generally to any constable of the county, commanding him to sell the animal or animals seized, at public auction, for the best price he can obtain therefor, and to make return thereof to the justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. The sale must be made upon the like notice, and in like manner, as a sale of property, by virtue of an execution issued by a justice of the peace;¹ and the constable must make return, as required by the warrant, and must pay the proceeds of the sale to the justice, deducting therefrom his fees, at the rate allowed by law for the collection of such an execution.²

SECTION XIV.

DISTRAINING CHATTELS; WRECKS; COUNTY TREASURER'S WARRANTS; PROCEEDINGS TO REMOVE OFFICERS.

The duties of constables in these proceedings are concurrent with those of the sheriff, and may be found in the former part of this work.³ The same as to wrecks;⁴ same as to county treasurer's warrants;⁵ and as to proceedings to remove officers.⁶

SECTION XV.

PAWNED PROPERTY.

Whenever any person shall make oath before any justice of the peace, police justice, or assistant justice, that any property belonging to him has been embezzled or taken without his consent, and that he has reason to believe and suspect, and does suspect, that such property has been pledged with any pawnbroker, such justice, if satisfied of

¹ See *Ante*.

² Code Civ. Pro., § 3091.

³ *Ante*, pp. 498, 499.

⁴ *Ante*, pp. 484-489.

⁵ *Ante*, p. 520.

⁶ *Ante*, p. 500.

the correctness of such suspicions, shall issue his warrant, directed to any constable of the city or place, commanding him to search for the property so alleged to have been embezzled or taken, and to seize and bring the same before such justice.¹ The constable to whom any such warrant shall be directed and delivered, shall have the same power to execute the same, and shall proceed in the same manner as in the case of a search warrant issued upon a charge of larceny.² And when the property is so seized by virtue of such warrant, the constable shall bring it forthwith before the magistrate issuing the warrant, to be disposed of by him.

¹ 2 R. S. (5th ed.), 980, § 9; id. (6th ed.), 1006, § 9; 3 id. (7th ed.), 2123, § 10.

² 2 R. S. (5th ed.), 980, § 10; id. (6th ed.), 1006, § 10; 3 id. (7th ed.), 2123, § 11; *ante*, pp. 121-123.

CHAPTER III.

OF THEIR DUTIES IN CRIMINAL MATTERS.

The duties of constables, and their powers as well, on arrests for crime, with or without warrant, are the same as those of other peace officers. Of the different classes of warrants, and the duties in executing each, we have already learned.¹ And the powers and duties of peace officers with reference to disturbers of religious meetings,² gamblers,³ violators of the excise law,⁴ prize fighters, armed and disguised men,⁵ beggars and vagrants,⁶ disorderly persons, and other offenders;⁷ and as to bastardy proceedings,⁸ proceedings respecting masters, apprentices and servants,⁹ sub-pœnas,¹⁰ search of habitual criminals,¹¹ and other proceedings, have already been detailed.

SECTION I.

COURT OF SPECIAL SESSIONS.

Jury, how Summoned.—If a trial by jury be demanded in a court of special sessions, other than in the county of New York, the court shall issue an order, directed to any constable of the county, or marshal of the city where the offense is to be tried, and having authority to execute process from the court, commanding him to summon twelve good and lawful men, qualified to serve as jurors, and not exempt from such service by law, and who shall be in no

¹ *Ante*, pp. 94–126.² *Ante*, pp. 43–45.³ *Ante*, pp. 47–53.⁴ *Ante*, p. 53.⁵ *Ante*, p. 53.⁶ *Ante*, pp. 45–47.⁷ *Ante*, p. 117.⁸ *Ante*, p. 116.⁹ *Ante*, p. 118.¹⁰ *Ante*, pp. 179–183.¹¹ *Ante*, p. 126.

wise of kin, either to the complainant or the defendant, to appear before such court, at a time not more than three days from the date of the order, and at a place to be named therein, to make a jury for the trial of such offense.¹ The officer to whom such order shall be delivered shall execute the same fairly and impartially, and shall not summon any person whom he shall suspect to be biased or prejudiced for or against the defendant. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the order and return with it to the court.² If the officer to whom the order is delivered do not so return it, he may be punished by the court, as for contempt; and the court must issue a new order for the summoning of jurors, in substantially the same form; upon which the same proceedings must be had as upon the first one issued.³ If six of the jurors summoned do not attend, or be not obtained, the court may direct the officer to summon any of the bystanders, or others, who may be competent, and against whom there is no sufficient cause of challenge, to act as jurors.⁴

Oath of Office—After hearing the proofs and allegations, the jury may either decide in court or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: "You do swear, that you will keep this jury together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court: that you will not permit any person to speak to or communicate with them, nor do so yourself, unless it be to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court."⁵ If the jury be duly discharged, without a verdict, the court may proceed again to the trial, in the same manner as upon the first trial; and so on until a verdict is rendered.⁶

¹ Code Crim. Pro., § 703, as amended by Laws of 1882, chap. 360.

² Code Crim. Pro., § 704.

³ Code Crim. Pro., § 709, as amended by Laws of 1882, chap. 360.

⁴ Code Crim. Pro., § 708.

⁵ Code Crim. Pro., § 713.

⁶ Id. § 716.

Judgment, by Whom Executed.—The judgment must be executed by the sheriff of the county, or by a constable, marshal or policeman of the city, village or town in which the conviction is had, upon receiving a copy of the certificate prescribed in § 721 of the Code of Criminal Procedure,¹ certified by the court or county clerk.² As this copy of the certificate is the process under which the officer acts, he should carefully see that it is in due form; otherwise he may be a trespasser.

Custody of Defendant.—During the time allowed to the defendant to give bail, and until judgment is given, the defendant may be continued in the custody of the officer, or committed to the jail of the county to answer the charge, as the magistrate may direct.³ When committed, the de-

¹ The certificate of conviction should be, as follows: "Court of Special Sessions or Police Court. County of *Albany*, town of *Berne*, (or as the case may be).

The People of the State of New York }
agt. }
 A. B. }

January 1, 18 .

The above named A. B., having been brought before C. D., justice of special sessions, justice of the peace (or other magistrate, as the case may be) or police justice of the town (or city or village), of (as the case may be), charged with (briefly designating the offence)."

"And having thereupon pleaded guilty (or not guilty as the case may be) and demanded ("or failed to demand" as the case may be), a jury, and having been thereupon duly tried, and upon such trial duly convicted. It is adjudged that he be imprisoned in the jail of this county days" (or pay a fine of dollars, and be imprisoned until it be paid, not exceeding days, or both as the case may be).

Dated at the town (or city) of the day of eighteen hundred and .

C. D., Justice of the peace, or police justice, or other justice or other magistrate (as the case may be) of the town (or city) of (as the case may be)."
 [Code Crim. Pro., § 721, as amended by the Laws of 1880, chap. 360.]

² Code Crim. Pro., § 725.

³ Code Crim. Pro., § 733. If the defendant be committed to the jail of the county, the commitment must be signed by the magistrate, by his name of office, and must be in substantially the following form:

"The sheriff of the county of , is required to receive and detain A. B., who stands charged before me for (designating the offense generally), to answer the charge before a court of special sessions in the town (or city) of (as the case may be).

"Dated at the town (or city) of , the day of , 18 .

"C. D., Justice of the peace of the town (or city) of " (as the case may be [Code Crim. Pro., § 734]).

fendant must be delivered to the custody of the proper officer, by any peace officer in the county to whom the magistrate may deliver the commitment.¹

SECTION II.

IN CASES OF LUNACY.

Lunatic, how Secured.—In case of the refusal or neglect of the committee, or of the relatives, of a lunatic who has become furiously mad, or so far disordered in his senses as to endanger his own person, or the person or property of others, if permitted to go at large, to confine and maintain such lunatic, in such manner as shall be approved of by the overseers of the poor of the city or town; or, where there is no such committee or relative of sufficient ability; it shall be the duty of the overseers of the poor of the city or town where such lunatic or mad person shall be found, to apply to any two justices of the peace of the same city or town, who upon being satisfied, upon examination, that it would be dangerous to permit such lunatic to so go at large, shall issue their warrant directed to the constables and overseers of the poor of such city or town, commanding them to cause such lunatic or mad person to be apprehended, and to be safely locked up and confined in such secure place as may be provided by the overseers of the poor, to whom the same shall be directed, within the town or city of which such overseers may be officers, or within the county in which such city or town may be situated, or in the county poor-house in those counties where such houses are established, or in such private or public asylum as may be approved by any standing order or resolution of the supervisors of the county in which such city or town may be situated, or in the lunatic asylum in the city of New York.² The warrant may be delivered for execution to any one of the constable of the city or town.

Power of Justices Without Application.—Any two justices of the peace of the city or town where any such luna-

¹ Code Crim. Pro., § 735.

² 2 R. S. (5th ed.), 883, § 4; 3 id. (7th ed.), 1899, § 4.

tic or mad person shall be found, may, without the application of any overseers of the poor, and upon their own view, or upon the information or oath of others, whenever they deem it necessary, issue their warrant for the apprehension and confinement of such lunatic or mad person as aforesaid.¹

Confinement of Lunatic.—It shall be the duty of the overseers of the poor to whom such warrant shall be directed, to procure a suitable place for the confinement of such lunatic, as therein directed.² The constable to whom such warrant is delivered should arrest the lunatic as upon a warrant in a civil action and convey him to the place so provided by the overseers. But such lunatic shall not be committed as a disorderly person to any prison, jail, house of correction or confined therein, unless an agreement shall have been made for that purpose with the keepers thereof, or in any other way than as above directed.³ Nor shall such lunatic be confined in the same room with any person charged with or convicted of a crime, or in any jail, more than four weeks.⁴ Any overseer of the poor, constable, keeper of a jail, or other person, who shall confine any such lunatic or mad person in any other manner or in any other place than such as above prescribed, shall be deemed guilty of a misdemeanor; and, on conviction, shall be liable to a fine not exceeding \$250, or to imprisonment not exceeding one year, or to both, in the discretion of the court before which the conviction shall be had.⁵ *In no case* shall such lunatic be confined in any place other than a State lunatic asylum or public or private asylum duly approved, for a longer period than ten days.⁶

SECTION III.

AS TO HABITUAL DRUNKARDS.

Contesting charge.—Any person designated, as provided by law, by the overseer of the poor, as an habitual drunk-

¹ 2 R. S. (5th ed.), 883, § 8; 3 id. (7th ed.), 1900, § 8.

² 2 R. S. (5th ed.), 883, § 5; 3 id. (7th ed.), 1899, § 5.

³ 2 R. S. (5th ed.), 883, § 6; id. (6th ed.), 842, § 8, 3 id. (7th ed.), 1899, § 6.

⁴ 2 R. S. (5th ed.), 883, § 7; id. (6th ed.), 843, § 9; 3 id. (7th ed.), 1900, § 7.

⁵ 2 R. S. (5th ed.), 884, § 11; id. (6th ed.), 843, § 10; 3 id. (7th ed.), 1900, § 11.

⁶ 2 R. S. (5th ed.), 889, § 35; id. (6th ed.), 842, § 7; 3 id. (7th ed.), 1902, § 7.

ard, may apply to any justice of the peace of the city or town in which the person designated resides, for process to summon a jury to try and determine such fact of drunkenness. On such application, the justice shall immediately give notice thereof, in writing, to the overseers of the poor, specifying the time and place where the parties shall meet for the trial of such fact, and shall issue a venire to any constable to summon a jury of twelve persons, competent to serve on juries, to appear at said time and place, for the purpose of trying the said fact. Such jury shall be summoned, returned, and six of them shall be balloted for by such justice, and shall be sworn well and truly to try the fact of the alleged drunkenness, in the same manner as for the trial of issues in suits brought before a justice of the peace ;¹ and witnesses shall be summoned, and their attendance and testimony enforced, and they shall be sworn and examined before the said jury in like manner. Any process in such proceedings shall be executed as if it were a process in a civil action before the justice."

SECTION IV.

AS TO HAWKERS AND PEDDLERS.

Penalty for Refusing to Produce License.—Every person found traveling and trading within this state, who shall refuse to produce a license as a hawker or peddler, to any officer or citizen who shall demand the same, shall, for each offense, forfeit the sum of ten dollars, to the overseer of the poor of the town in which the demand shall be made, for the use of the poor therein ; and every such offender, who, after notice, shall refuse or neglect to pay the above penalty, shall be committed by the justice before whom the conviction shall be had, to the jail of the county in which the offense shall have been committed, for the term of one month. Any citizen may apprehend and detain any person who shall be found trading as a hawker or peddler, with-

¹ See *ante*.

² 2 R. S. (5th ed.), 901, §§ 3-9; id. (6th ed.), 877, §§ 3-9; 3 R. S. (7th ed.), 1946, §§ 3-9.

out license, or contrary to the terms of his license, or who shall refuse to produce a license, when its production is demanded ; and may convey the offender before any justice of the peace, in the town or county in which he shall be apprehended. It shall be the duty of such justice, if a sufficient license to authorize such trading be not produced to him, and the fact of trading be proved to him, either by the confession of the person so apprehended, or the oath of competent witnesses, to convict the offender of such offenses as shall be so confessed or proved ; and to issue his warrant on such conviction, directed to some constable of the county in which the conviction shall be had, commanding such constable to cause the sum of twenty-five dollars, with costs not to exceed five dollars, to be forthwith levied by distress and sale, at public vendue, of the goods, wares and merchandise of the offender. In every case of a prosecution against any person for the recovery of such penalty, no costs shall be allowed the defendant, if it shall appear that before the commencement of the prosecution, such defendant had refused to produce his license, or to disclose his name when lawfully required ; nor in such case shall the defendant be entitled to maintain any action, against the person prosecuting him or the constable, or other persons by whom he may have been apprehended, or the justice issuing any warrant or other process against him, or before whom he may have been tried for any of their acts in so prosecuting, apprehending, or trying him. No suit or prosecution for the recovery of such penalty shall be maintained, unless it shall appear to be brought within sixty days after the offence charged. Every person who shall be sued for putting in execution the above provisions respecting hawkers and peddlers, or doing any matter or thing pursuant to such provisions, may plead the general issue, and give the special matter in evidence ; and if the plaintiff in any such suit shall not prevail, the defendant shall be entitled to recover treble costs.¹

¹ 2 R. S. (5th ed.), 473, 474, §§ 7-12; id. (6th ed.), 249, §§ 7-12; id. (7th ed.), 1293, 1294, §§ 7-12.

SECTION V.

AS TO CHILDREN.

1. *Idle and Truant Children.*

Duty of Constables Regarding Truant Children.—It shall be the duty of all police officers and constables, who shall find any child, between the ages of five and fourteen years, having sufficient bodily health and mental capacity to attend the public schools, wandering in the streets or lanes of any city, or incorporated village, idle and truant, without any lawful occupation, to make complaint to any justice of the peace, or police justice, in such city or incorporated village, or in the city of New York to one of the justices of the district courts of that city, so that the child may be proceeded against as provided by law.¹ The officer so making complaint, or any other officer to whom the justice may deliver the warrant therefor, must bring up such child for examination and execute any other mandate duly issued by the justice in the proceeding.

To Arrest Child on Platform of Cars.—It shall be the duty of all constables and policemen within this State to arrest any child, not being a passenger, riding upon the platform or steps of any railroad car drawn by steam, or of any omnibus, street car or other vehicle drawn by horses.²

2. *Cruelty to Children.*

Chapter three of the Penal Code provides as follows :

Abandonment of Child Under Six Years.—A parent, or other person, having the care or custody, for nurture or education, of a child under the age of six years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a State prison, for not more than seven years, or in a county jail for not more than one year.³

Unlawfully Omitting to Provide for Child.—A person who willfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing,

¹ Laws of 1853, chap. 185, §§ 1, 5; 2 R. S. (7th ed.), 1205, 1206, §§ 1, 5.

² Laws of 1880, chap. 585; 3 R. S. (7th ed.) 2137.

³ Penal Code, § 287.

shelter, or medical attendance to a minor, is guilty of a misdemeanor.¹

Endangering Life, Health, or Morals of a Child.—A person who, having the care or custody of a minor, either

1. Willfully causes or permits the minor's life to be endangered, or its health to be injured, or its morals to become depraved ; or

2. Willfully causes, or permits the minor to be placed in such a situation, or to engage in such an occupation, that its life is endangered, or its health is likely to be injured, or its morals likely to be impaired ;

Is guilty of a misdemeanor.²

Child in Concert Saloon.—A person who admits to, or allows to remain in, any dance-house, concert saloon, theatre or other place of entertainment, owned, kept or managed by him, where wines, or spirituous or malt liquors, are sold or given away, any child, actually or apparently under the age of fourteen years, unless accompanied by a parent or guardian, is guilty of a misdemeanor.³

Child Begging, etc.—A male child actually or apparently under the age of sixteen years, or a female child, actually or apparently under the age of fourteen years, who is found,

1. Begging or receiving or soliciting alms, in any manner or under any pretense ; or

2. Not having any home or other place of abode, or proper guardianship ; or

3. Destitute of means of support, and being either an orphan, or living or having lived with or in custody of a parent or guardian, who has been sentenced to imprisonment for crime, or who has been convicted of a crime against the person of such child, or has been adjudged an habitual criminal ; or,

4. Frequenting the company of reputed thieves or prostitutes, or a house of prostitution or assignation, or living in such a house either with or without its parent or guardian, or frequenting concert saloons, dance-houses, theatres or other places of entertainment, or places where wines,

¹ Penal Code, § 288.

² Penal Code, § 290.

³ Penal Code, § 289.

malt or spirituous liquors are sold, without being in charge of its parent or guardian ; or,

5. Coming within any of the descriptions of children mentioned in section 292 of the Penal Code (see *post*), must be arrested and brought before a proper court or magistrate, as a vagrant, disorderly or destitute child. Such court or magistrate may commit the child to any charitable, reformatory or other institution authorized by law to receive and take charge of minors, or may make any disposition of the child such as now is or hereafter may be authorized in the cases of vagrants, truants, paupers, or disorderly persons.*

Certain Employment of a Child Prohibited.—A person who employs or causes to be employed, or who exhibits, uses, or has in custody for the purpose of exhibiting or employing, a female child apparently or actually under the age of fourteen years, or a male child apparently or actually under the age of sixteen years, or who, having the care, custody or control of such a child as parent, relative, guardian, employer or otherwise, sells, lets out, gives away or in any way procures or consents to the employment or exhibition of such a child, either,

1. As a rope or wire-walker, dancer, gymnast, contortionist, rider or acrobat ; or,

2. In begging or receiving alms, or in any mendicant occupation ; or,

3. In peddling, singing or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation ; or,

4. In any indecent or immoral exhibition or practice ; or,

5. In any practice or exhibition dangerous or injurious to the life, limb, health or morals of the child ;

Is guilty of a misdemeanor. But this section does not apply to the employment of any child as a singer or musician in a church, school or academy, or in teaching or learning the science or practice of music, or as a musician in any concert with the written consent of the mayor of the city, or the president of the board of trustees of the village, where such concert takes place.²

Duty of Officers.—A constable or police officer *must*, and

* Penal Code, § 291.

² Penal Code, § 292.

any agent or officer of any incorporated society for the prevention of cruelty to children *may* arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this chapter (of the Penal Code), and any minor coming within any of the descriptions of children mentioned in section 291 or in section 292 (Penal Code). Such constable, police officer, or agent, may interfere to prevent the perpetration in his presence of any act forbidden by said chapter.

A person who obstructs or interferes with any officer or agent of such society in the exercise of his authority under said chapter is guilty of a misdemeanor.¹

SECTION VI.

AS TO VIOLATION OF QUARANTINE LAW.

The health officer of the port of New York may direct, in writing, any constable or other citizen to pursue and apprehend any person who shall violate any quarantine law or regulation, or who shall obstruct the health officer in the performance of his duty, and deliver him over to the said officer, to be detained at quarantine until discharged by such officer; but such confinement shall, in no case, exceed ten days, and it shall be the duty of the constable or other citizen so directed to obey such directions.²

¹ Penal Code, § 293.

² Laws of 1863, chap. 358, § 26, subd. 3; 2 R. S. (7th ed.), 1057, § 26, subd. 3.

CHAPTER IV.

OF THE LIABILITY OF CONSTABLES; AND OF THEIR SURETIES.

Generally.—The liability of a constable and of his sureties for the acts of the former, relative to the execution of civil process, is, generally, similar to that of a sheriff and his sureties in the execution of like process by the sheriff. The criminal liability of a constable is, also, in most cases, similar to that of a sheriff. Where it is other or different, the liability has been already pointed out. And where the civil liability is different it will be detailed in this chapter.

Limitation, Statute of.—An action against a constable for the non-payment of money collected upon an execution; or an action upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty, except an escape, must be brought within three years after the cause of action therefor has accrued.¹ An action for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate must be brought within one year after the cause of action therefor has accrued.²

Action for not Returning Execution.—If a constable fails to return an execution within five days after the return day thereof, the party, in whose favor it was issued, may recover, in an action against the constable, the amount of the execution, if it was issued upon a judgment for a sum of money; or if it was for the delivery of the possession of a chattel, the value of the chattel, as specified in the judgment, together with the damages and costs awarded thereby; and, in either case, with interest from the time when the judgment was rendered.³ It is not necessary to show moneys collected by the constable, to sustain an action against him

¹ Code Civ. Pro., § 383.

³ Code Civ. Pro., § 3039.

² Code Civ. Pro., § 385.

for the neglect to return the execution.¹ And his sickness during the time the execution was in his hands would be no defense to such an action.² But a constable is not liable in a case where the plaintiff has directed a renewal of the execution.³

Action for Money Collected.—Where money, collected by a constable upon an execution, is not paid over by him, according to law, any person entitled thereto may maintain an action in his own name, upon the instrument of security given by the constable and his sureties; and may recover therein the sum so collected, with interest from the time when it was collected.⁴ But an action does not lie against a constable for not paying over money collected by him on execution, where he has been sued and a recovery had against him for selling property, by the sale of which the money collected by him was made, where such recovery is equal to or exceeds the amount of the execution.⁵ And this is so, although the plaintiff in the execution on the delivery of the process executed a bond of indemnity to the constable, and, notwithstanding, that the constable has brought an action upon such bond.⁶

In general, it may be said that actions by and against constables and their sureties, relative to official acts are governed by the same rules, and are supported or defended by like proof as in similar cases against sheriffs and their sureties.

A wrongful seizure, by a constable, of the property of one not a defendant in the execution, is a breach of the condition of the constable's official bond.⁷ A surety on the bond of a city constable is liable for his official misconduct, as shown by a judgment against him for unlawful taking of property under color of official duty, although it does not appear that he was sued in his official capacity. Parol evidence is admissible to show that the act was done *colore*

¹ Sloan v. Case, 10 Wend., 370; Lawton v. Erwin, 9 id., 233, Warren v. Racy, 20 Johns., 74.

² Freudenstein v. McNier, 81 Ill., 208.

³ Homan v. Liswell, 6 Cow., 659.

⁴ Code Civ. Pro., § 3041.

⁵ Newland v. Baker, 21 Wend., 263.

⁶ Id.

⁷ United States v. Hine, 3 MacArthur, 27.

officii.¹ In an action on a constable's bond for his failure to levy an execution, the plaintiff must prove the existence, but not the regularity of the judgment.² But the constable and his sureties may show in defense that the judgment was absolutely void.³

The sureties upon a constable's bond restricted to liabilities incurred "on account of any execution delivered to him for collection," are liable for a wrongful levy made by the constable under an execution against the property of a person other than the judgment debtor. The liability of the constable therefor is not merely one for the commission of a private trespass, but arises out of an act done *colore officii*., in supposed obedience to the mandate of the execution.⁴ And a bond, given by a constable in obedience to a statute without having incorporated in it a provision required by an amendment of that statute, is not thereby invalidated.⁵ A constable seeking to justify under an execution, as against a stranger to the judgment, must always show that the execution was supported by a valid judgment.⁶ Where the constable seizes, under an execution, the person or property of the wrong party; or where he does the like act against the proper party under a void execution, he cannot defend the trespass on the ground that he was a minor.⁷

¹ New York v. Ryan, 7 Daly, 436.

² State v. Miller, 48 Mo., 257.

³ Lawton v. Erwin, 9 Wend., 233; Ray v. Hogeboom, 11 Johns., 433.

⁴ People *ex rel.* Comstock v. Lucas, 25 Hun, 610.

⁵ Id. Skellinger v. Yendes, 12. Wend., 306; Dutton v. Kelsey, 2 id., 615.

⁶ Thatcher v. Maack, 7 Ill., App. 635; Bean v. Loftus, 48 Wis., 371; Gates v. Neimeyer 54 Iowa, 110.

⁷ Green v. Burke, 23 Wend., 490.

CHAPTER V.

OF THE FEES OF A CONSTABLE.

SECTION I.

IN CRIMINAL CASES.

Fees Chargeable to the County.—Constables shall hereafter be allowed the fees hereinafter stated for the following services in criminal cases :

For serving a warrant.....	\$0 75
For every mile traveled, going and returning.....	10
For taking defendant into custody on a mittimus	25
For every mile traveled in taking a prisoner to jail, going and returning,	10
For serving every subpoena.....	25
For every mile traveled in serving each subpoena, going and returning..	5
For notifying a complainant	25
For every mile traveled in notifying a complainant, going and returning,	5
For keeping a prisoner, after being brought before the justice, and by his direction, in custody, <i>per day</i>	1 00
For taking charge of a jury during their deliberations.....	50
For attending any court of record, except in Kings or New York counties (see Code Civ. Pro., § 3312), pursuant to a notice from the sheriff for that purpose, for each day.....	2 00
For each mile traveled in going to and returning from such court.....	5

Which fees shall be chargeable to the county, and shall be paid by the treasurer thereof on the production of the certificate of the clerk, specifying the number of days and distance traveled.¹ The constable is entitled to the compensation for attending court, if summoned so to do by the sheriff, though he should also be a deputy of the sheriff, and perform none of the duties of the constable. It is sufficient that he be summoned and ready to act.² Whenever a

¹ Laws of 1866, chap. 692, § 8, as amended by the Laws of 1877, chap. 89; 3 R. S. (7th ed.), 2585, § 8.

² People ex rel. Holley v. Supervisors of Columbia Co., 4 Cow., 146.

subpœna for witnesses in criminal cases or complaints, containing one or more names, shall be served by a constable or other officer, such officer shall be allowed for mileage only for the distance, going and returning, actually traveled to make such service upon all the witnesses in such case of complaint, and not separate mileage for each witness, unless the board of supervisors auditing accounts for such services shall deem it equitable to make a further allowance.¹ The board of supervisors may allow such further compensation for the service of process, and the expense and trouble attending the same as they shall deem reasonable.

For other services in criminal cases, for which no compensation is specially provided by law, such sum as the board of supervisors of the county shall allow.² No travel fees shall be allowed for traveling to subpœna a witness, beyond the limits of the county in which the subpœna was issued, or of an adjoining county, unless the board auditing the account shall be satisfied by proof that such witnesses could not be subpœnaed without additional travel; nor shall any travel fees for subpœnaing witnesses be allowed, except such as the board auditing the account shall be satisfied were indispensably necessary.³ Where travel fees may be fixed by the supervisors, the court will not exercise control over their action in that regard, the amount being in the discretion of the supervisors.⁴ All accounts of constables for services in criminal cases, except for attending courts, should be presented to the board of supervisors, to be audited by them, except where the law provides a board of town auditors, in which cases all accounts chargeable to the town should be audited by the town auditors.

Herkimer County.—The board of supervisors of Herkimer county may prescribe such reasonable limits as they may deem sufficient for the aggregate amount of fees to be allowed to all constables for services in criminal cases chargeable to the towns, and also each town in said county severally. But this is not to apply to those cases of felony

¹ Laws of 1836, chap. 506, § 1; 3 R. S. (7th ed.), 2580.

² 3 R. S. (5th ed.), 1047, § 4; id. (6th ed.), 1049, § 3; id. (7th ed.), 2578, § 4.

³ Laws of 1845, chap. 180, § 27; 1 R. S. (7th ed.), 846, § 27.

⁴ *Ex parte Farrington*, 2 Cow., § 407.

in which extraordinary services shall be rendered by the written direction of the district attorney, given in advance of the services, and specifying as nearly as may be the particular services required. The constables of the towns in which the fees shall be so limited, shall keep an account of the services by them rendered in criminal cases, distinguishing between those chargeable to the town and county respectively; and if the legal fees shall exceed the prescribed limits, they shall be divided by the board of supervisors rateably among the officers rendering the services.¹

Richmond County.—In Richmond county no constable shall be entitled to receive any fee or compensation from any of the towns of the county, except the town in which he resides and for which he was elected; and his fees and compensation for town and county charges shall not exceed \$300 per year; and he shall not be entitled to any fee or compensation, unless the services for which the same is claimed, shall have been performed within one year next preceding the time of the presentation of the claim to the board of supervisors or the board of town auditors.²

SECTION II.

IN CIVIL CASES.

Civil Actions.—A constable is entitled for the services hereinafter specified, rendered in an action brought before a justice of the peace, or in a justice's court of a city:

For serving a summons	\$0 25
For serving a summons and executing an order of arrest.....	1 00
For serving a summons and levying a warrant of attachment.....	1 00
For serving a summons and affidavit, and executing a requisition, in an action for a chattel	1 00
For serving an order, directing an action to be continued before a justice, other than the one before whom it is pending, and for attending before the latter.....	50
And, in addition, if he so attends with a person in his custody.....	50
For collecting money by virtue of an execution, for every dollar collected to the amount of fifty dollars.....	5
For every dollar collected over fifty dollars.....	.025

¹ Crocker on Sheriffs, 498, § 1178.

² Laws of 1866, chap. 59, §§ 1, 2, 3.

Where a judgment or execution is settled after a levy, the constable is entitled to poundage upon the sum at which the settlement is made, not exceeding the value of the property levied upon.	
For each mile necessarily traveled, going and returning, to serve a summons, or to serve or execute any other mandate, except a venire, the distance to be computed from the place of abode of the person served, or the place where it is served to the place where it is returnable.....	10
But where two or more mandates in one action are served or executed upon one journey, or where a mandate is served upon or executed against two or more persons in one action, he is entitled, in all, to only ten cents for each mile necessarily traveled.	
For notifying the plaintiff of the execution of an order of arrest	25
And for going to the plaintiff's residence, or, if he is found elsewhere, to the place where he is found, to serve such a notice, for each mile traveled, going and returning	10
For subpoenaing each witness, not exceeding four.....	25
For notifying the jurors to attend a trial	75
For taking charge of a jury during their deliberations.....	50
Where witnesses, not exceeding four, are subpoenaed by any person other than a constable, the fee therefor, for the service on each person, is.....	13 ¹

In a Special Proceeding.—The following are the fees of a constable in a special proceeding :

For notifying jurors to attend to assess damages in proceedings relating to highways	2 00
For notifying jurors to attend in any other case, unless a fee therefor is specially prescribed by law, for each person notified	10
And for each mile actually and necessarily traveled, going from and returning to his place of residence.....	10
For serving a precept or other mandate by which the special proceeding is commenced	25
For serving a warrant, in any case where a fee therefor is not specially prescribed by law	50
For serving an order, directing the special proceeding to be continued before a justice other than the one before whom it is pending, and for attending before the latter, with or without a person in his custody...	1 00
For arresting and committing any person, pursuant to process.....	1 00
For subpoenaing each witness, not exceeding four.....	25
For each mile necessarily traveled, going and returning, to serve or execute a mandate, the distance to be computed from the place where it is served or executed to the place where it is returnable, unless a different rate of travel fees upon the service or execution thereof is specially prescribed by statute	10
Where two or more mandates are served or executed in one special proceeding, the limitation upon the amount of travel fees specified above in civil actions applies. ²	

¹ Code Civ. Pro., § 3323, first part.

² Code Civ. Pro., § 3323, last clause.

Affidavit Upon Claim for Travel Fees.—A constable, who charges any travel fees, must show, by affidavit, that the travel was necessary to perform the service with respect to which it is charged ; that no more miles were charged for, than were actually and in good faith traveled for that purpose ; that he had, at the time, no other official or private business upon the route so traveled ; and that the traveling fees are charged on one mandate only, which must be attached to or described in the affidavit. The justice taxing the fees must be satisfied, that the miles charged for were actually and necessarily traveled, as stated in the affidavit.¹ A constable is not obliged to render any of the services specified above, in civil actions or special proceedings, before a justice of the peace, without the previous payment, or tender of his fee therefor.² A constable is not entitled to travel fees for traveling to serve process unless the service is actually made.³ Nor is he entitled to recover his fee upon an execution where he has levied upon property and returned that it remains on his hands for want of buyers. To entitle him to his fees, he must levy the money, except where he is prevented by the act of the plaintiff, or by operation of law.⁴

Summary Proceedings.—In summary proceedings, the fees of officers are limited to the rate allowed by law for like services in an action in a justice's court, or, in the city of New York, in a district court, except where a fee is specially given in § 3323 of the Code of Civil Procedure, for a service rendered in the proceeding.⁵ A summary proceeding is a special proceeding.

¹ Code Civ. Pro., § 3324.

² Code Civ. Pro., § 3328.

³ *Ex parte*, Wyles, 1 Denio, 658,

⁴ *Pixley v. Butts*, 2 Cow., 421.

⁵ Code Civ. Pro., § 2250, as amended in 1882.

FORMS FOR SHERIFFS.

No. 1.

Oath of Office for Sheriffs, Coroners, or Constables.

(See page 3.)

STATE OF NEW YORK, }
County of , } ss.:

I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of sheriff (under-sheriff, deputy sheriff, or coroner), of the county of (or of constable of the town of), according to the best of my ability.

And I do further solemnly swear (or affirm, as the case may be), that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote.

(Signature.)

Taken, subscribed and sworn before me, this day of , 18 }

No. 2.

Sheriff's Bond.

(See page 4.)

Know all men by these presents: That we (here insert name of sheriff, and if in the city and county of New York

the names of two sureties, if in any other county the names of two or more sureties, with the occupation and place of residence of each surety) are held and firmly bound unto the people of the State of New York in the penal sum of (if in the city and county of New York twenty thousand dollars, if in any other county ten thousand dollars), to be paid to the said people; for which payment, well and truly to be made, we bind ourselves and our and each of our heirs, executor and administrators, jointly and severally, firmly by these presents.

Whereas, the above bounden (here insert name of sheriff) hath been elected to the office of sheriff of the county of _____ at the general election held therein (or at a special election held therein) on the _____ day of *

Now, therefore, the condition of the above obligation is such, that if the said (here insert name of sheriff) shall well and faithfully, in all things, perform and execute the office of sheriff of the said county of _____ during his continuance in the said office by virtue of the said election, without fraud, deceit or oppression, then the above obligation to be void, or else to remain in full force.

[L. S.]

[L. S.]

Sealed and delivered in }
the presence of }

[L. S.]

No. 3.

Oath of Sureties on Sheriff's Bond.

(See page 4.)

County of _____, ss.:

C. D. and E. F., being severally duly sworn say, and each says, that he is one of the sureties named in and who executed the within bond, and is a freeholder within the State of New York, and is worth the sum of (if in the city and county of New York, twenty thousand dollars, and if in any other county such sum as shall be proportionate to the number of sureties and the penalty of the bond), over and above all debts whatsoever owing by him.

Severally sworn to this day }
of _____, before me, }

Clerk of _____ *County.*

No. 4.

Clerk's Approval of Sureties on Sheriff's Bond.

(See page 4.)

I approve of the sufficiency of the sureties executing the within bond.

Dated,

Clerk of County.

(To be indorsed on bond.)

No. 5.

Renewal of Sheriff's Bond.

(See page 4.)

Same as No. 2 down to *, then insert as follows: "And, whereas, the said sheriff did, on the day of , execute his official bond, and hath since been and now is such sheriff."

Add condition same as No. 2.

No. 6.

Bond Under Military Code.

(See pages 4, 5.)

Same as No. 2 down to *, then add as follows:

Now, therefore, the condition of this obligation is such, that if the said (here insert name of sheriff) shall pay all moneys by him collected, as such sheriff, under the provisions of the military code, to the officer entitled thereto, then the above obligation to be void, or else to remain in full force.

[L. S.]

[L. S.]

[L. S.]

Sealed and delivered in }
the presence of }

(The penalty of this bond is such sum as may be approved by the county judge of the county, whose approval must be indorsed upon the bond, as to the amount, form, and sufficiency of sureties.)

No. 7.*Resignation of Sheriff.*

(See page 9.)

To His Excellency G. C., Governor of the State of New York :

SIR—I do hereby resign the office of sheriff of the county of .

R. H.,
Sheriff of the County of

No. 8.*Appointment of Under-Sheriff or Deputy.*

(See page 14.)

Know all men by these presents : That I, R. H., sheriff of the county of , do hereby appoint L. E., of the town of , in said county (under-sheriff or deputy sheriff as the case may be), of said county.

Witness my hand and seal, this day of , 18 .
 R. H., *Sheriff*. [L. S.]

No. 9.*Resignation of Under-Sheriff or Deputy.*

(See page 15.)

To R. H., *Sheriff of the county of* :

SIR—I hereby resign the office of (under-sheriff or deputy sheriff) of the county of .

Dated,

Yours, etc.,

A. B.

No. 10.*Appointment of Special Deputy.*

(See page 17.)

Know all men by these presents : That I, O. G., sheriff (or under-sheriff) of the county of Fulton, do hereby ap-

point J. D., of the town of _____, in said county, a special deputy sheriff of the county aforesaid to (here specify the act for the doing of which the deputy is made).

O. G.,
Sheriff of the County of _____.

No. 11.

Bond of Under-Sheriff, Deputy, Special Deputy or Jailer.

(See page 22.)

Know all men by these presents: That we (here insert names of appointee, and one or two sureties as required, with places of residence of sureties and occupations) are held and firmly bound unto R. H., sheriff of the county of _____, in the sum of _____, to be paid to the said R. H., or to his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally. Sealed with our seals, and dated this _____ day of _____ one thousand eight hundred and _____.

The condition of this obligation is such, that if (here insert name of appointee) the above bounden, shall faithfully perform the duties of (under-sheriff of the county of _____, deputy sheriff of the county of _____, special deputy sheriff of the county of _____, for the purpose of (here recite purpose of appointment of special deputy or jailer of the county of _____, as the case may be), to which office he has been appointed; and shall indemnify, and save harmless, the said R. H. from or on account of any of his acts or omissions in said office, then this application to be void, else to remain in full force.

Signed, sealed and delivered }
 in the presence of }

[L. S.]

[L. S.]

[L. S.]

(Add justification and acknowledgment as in form No. 79.)

No. 12.*Removal of Appointees.*

(See page 25.)

To A. B.

SIR—Take notice, that you are hereby removed from the office of (under-sheriff, deputy sheriff, or jailer, as the case may be).

Dated,

R. H., *Sheriff.***No. 13.***Notice of Place of Keeping Sheriff's Office..*

(See page 26.)

To all whom it may concern : Notice is hereby given that the office of sheriff of county will be kept at (here specify place).

Dated,

R. H., *Sheriff.***No. 14.***Designation of Temporary Jail.*

(See page 30.)

To all whom it may concern : Know ye, that, whereas, there is no jail in the county of (or, the jail of the county of , has become unfit, or unsafe for the confinement therein of some or all of the prisoners committed thereto ; or has been destroyed by fire, or otherwise ; or, a pestilential disease having broken out in said jail, or in the vicinity of said jail, and the physician to the jail having certified that it is likely to endanger the health of any or all of the prisoners in the jail ; stating the reason for such designation to be one or more of the reasons above set forth, *but giving the facts in full*, bringing the cause for designation within the same).

Now, therefore, I, , county judge of said county of (or, in the city and county of New York, the chief-judge of the court of common pleas), by virtue of the duty imposed by section 135 of the Code of Civil Procedure, do hereby designate (here describe the place designated, which

must be either a place in the same county, or the jail of a contiguous county) for the confinement of all the prisoners now committed to the jail of the county of . , or hereafter, and until the revocation hereof committed thereto (or, as the case may be, some of the prisoners committed to said jail, designating the number, class, or names).

Dated at . , this . day of . , 18 . .

County Judge of . County.

(Or, in the city and county of New York,

Chief-Judge of the Court of Common Pleas.)

No. 15.

Application to Governor for Guard.

(See page 36.)

To His Excellency, . , Governor of the State of New York :

Whereas (here recite the reason why such application is made necessary).

Now, therefore, the undersigned, sheriff (under-sheriff, or district attorney) of the county of . , hereby applies to you, pursuant to the statute in such case made and provided, for authority to contract with and organize a guard (for the protection of the county jail of . county ; or, to arrest, detain, and have in safe-keeping any prisoner or prisoners, naming them ; or, to enforce any process, judgment or decree of any court, describing it).

Dated at . , this . day of . , 18 . .

Sheriff (or Under-Sheriff, or District Attorney) of the County of .

I hereby assent to the foregoing application.

Dated at . , this . day of . , 18 . .

County Judge of Fulton County.

No. 16.

Calendar for Courts.

(See pages 38, 60, 174.)

To the Court of Oyer and Terminer (or the Court of Sessions) of the County of .

The following is a list of the names of every person now detained in the county jail of county (or other prison, as the case may be); with a statement of the time when each was committed, and by what process or precept, and the cause of the detention, to wit:

Name.	When Committed.	By what Process.	Cause.
A. B.	June 1, 1882.	Justice's Commitment.	Petit Larceny.

Dated at , this day of , 18 .

R. H.,
Sheriff of the County of .

No. 17.

Sheriff's Order for Military.

(See pages 54, 99, 190.)

To (naming the Commanding Officer of a Division, Brigade, Regiment, Battalion, or Company, and adding the military title of such officer):

You are hereby required, to order (here describe the kind and number of troops) to appear at (naming place), on the day of , 18 , at o'clock, . M. (or forthwith), then and there to aid me in (suppressing a riot, or to execute a warrant, describing same; or, as the case may be).

Dated at , this day of , 18 .

R. H.,
Sheriff of the County of .

No. 18.*Application to Governor to Proclaim County in Insurrection.*

(See pages 55, 99, 192.)

To His Excellency _____, Governor of the State of New York :

Whereas, the execution of process is forcibly resisted in my county by bodies of men (or combinations to resist the execution of process, by force, exist in my county) (and here set forth the kind of process resisted, or to resist which combinations exist; how the same have been and are resisted, or the nature and extent of combinations to resist the same; stating all the facts in regard thereto, fully and in detail); and I have exerted the power of the county for the execution of such process by (here set forth fully and in detail what effort has been made to execute the process), but that such power has not been sufficient:

Now, therefore, application is hereby made to you, pursuant to the statute in such case made and provided, to proclaim the said county to be in a state of insurrection.

Dated at this day of 18 .

R. H.

Sheriff (or District Attorney, or County Judge) of the County of .

No. 19.*Proclamation (Acting as Crier) on Opening Court.*

(See page 58.)

Hear ye, hear ye, hear ye: All manner of persons that have any business to do at this circuit court and court of oyer and terminer, held in and for the county of _____ (or other court, as the case may be), let them draw near and give their attendance, and they shall be heard.

No. 20.*Proclamation (Acting as Crier) Before Calling Grand Jury.*

(See page 58.)

You, good men, who are here returned to inquire for the people of the State of New York, for the body of the county of _____, answer to your names, every man, at the first call, and save your fines.

No. 21.*Proclamation (Acting as Crier) for Silence on Charging Grand Jury.*

(See page 58.)

All persons are strictly charged and commanded to keep silence, while the court is giving the charge to the grand jury, on pain of imprisonment.

No. 22.*Proclamation (Acting as Crier) to Return Recognizances.*

(See page 58.)

All justices of the peace, sheriffs and other officers, who have taken any recognizances, examinations or other matters, return the same to the court here, that they may proceed thereon.

No. 23.*Proclamation (Acting as Crier) Before Calling Petit Jury.*

(See page 58.)

Hear ye, hear ye, hear ye: You, good men, who are here returned, to try the several issues to be tried at this circuit court, and court of oyer and terminer (or other court, as the case may be), held in and for the county of _____, answer to your names at the first call, and save your fines.

No. 24.*Proclamation (Acting as Crier) for Persons to Appear on Recognizances.*

(See page 58.)

Hear ye, hear ye, hear ye : All manner of persons who are bound by recognizances to prosecute, or prefer, any bill of indictment, against any prisoner, or other person, let them come forth and prosecute, or they will forfeit their recognizances.

No. 25.*Proclamation (Acting as Crier) for Persons Bound to Answer.*

(See page 58.)

Hear ye, hear ye, hear ye : A. B., come forth and answer to your name, and save yourself and bail, or you will forfeit your recognizance.

No. 26.*Proclamation (Acting as Crier) for Bail to Produce Principal.*

(See page 58.)

Hear ye, hear ye, hear ye : C. D. and E. F., bring forth A. B., your principal, whom you have undertaken to have here this day, or you will forfeit your recognizance.

No. 27.*Proclamation (Acting as Crier) for Adjournment.*

(See page 58.)

Hear ye, hear ye, hear ye : All manner of persons who have any further business to do at this circuit court, and court of oyer and terminer (or other court), may depart hence, and appear here again to-morrow morning, at o'clock, to which time these courts are adjourned.

No. 28.*Proclamation (Acting as Crier) for Opening Court after Adjournment.*

(See page 58.)

Hear ye, hear ye, hear ye: All manner of persons who have been adjourned over to this hour, and have any further business to do at this circuit court, and court of oyer and terminer (or other court), may draw near, and give their attendance, and they shall be heard.

No. 29.*Sheriff's Proclamation for Oyer and Terminer.*

(See pages 59, 60.)

Sheriff's Proclamation:

Whereas, a court of oyer and terminer is appointed to be held in and for the county of _____, at the court house, in _____, on the _____ day of _____, 18 ____ . I do hereby, in obedience to a precept, to me directed and delivered by the district attorney of the county of _____, on the _____ day of _____, 18 ____, make proclamation to all persons bound by recognizance, or otherwise, to appear at said court, and notify them to appear thereat; and all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at such court, or who have taken any inquisition, or the examination of any prisoner or witness, are notified to return such recognizances, inquisitions and examinations to the said court, at the opening thereof, on the first day of the sitting.

Dated at _____, this _____ day of _____, 18 ____ .

R. H.,

Sheriff of the County of _____

No. 30.*List of Disorderly Persons to Court of Sessions.*

(See page 61.)

To the Court of Sessions of the County of _____ :

The following is a list of persons now in my custody, com-

mitted as disorderly persons, together with the nature of the offense of each, the name of the magistrate by whom committed, and the term of imprisonment, to wit:

Name.	Nature of offense.	By whom committed.	Term of imprisonment.
A. B.	Keeping bawdy-house.	C. D., justice of the peace.	Three months.

Dated at , this day of , 18 .

R. H.,
*Sheriff of the County of (or other
Keeper of Jail or Prison).*

No. 31.

Written Notice to Juror.

(See pages 65 and 69.)

To , *Esq.* :

SIR—Take notice, that you have been drawn as a grand (or petit) juror, at a court (naming the court) appointed to be held in and for the county of , at the court house in , on the day of 18 , at o'clock A. M., and are required personally to be and appear thereat.

Dated at , this day of , 18 .

R. H.,
Sheriff of the County of .

No. 32.

Return to Jury List.

(See page 65.)

County, ss.:

I hereby certify that I have personally summoned each of the persons named in the within (foregoing or annexed) jury list (except A. B., C. D. & E. F., therein named, each of whom were summoned by leaving a written notice at his place of residence, with a person of proper age, which notice contained a statement that he was drawn as such juror, and designated the time and place when and where he was required to appear as such; and except G. H., who could not be found, and has no known place of residence

in the county; and D. J., who had removed from the county); that each of said persons were so summoned at least six days previous to the first day of the sitting of the court within named.

Dated the day of , 18 .

R. H.,

Sheriff of the County of .

No. 33.

Certificate to New Sheriff by County Clerk.

(See pages 2, 8, 83.)

County, ss.:

I hereby certify that R. H., sheriff elect (or appointed), of the county of , has taken the oath of office, and filed the same, with the bond required by statute, approved by me, in my office.

Witness my hand and official seal, this day of , 18 .

[L. S.]

W. M.,

County Clerk of County.

No. 34.

Assignment by Late Sheriff to New Sheriff.

(See page 84.)

To all to whom these presents shall come, greeting:

Know ye, that whereas, I, A. B., late sheriff of the county of , have been served with a certificate of the clerk of the county of , showing that R. H., now the sheriff of said county, has duly qualified as such by taking the oath of office, and filing the same with the bond required by statute, approved by said clerk:

Now, therefore, pursuant to section 185 of the Code of Civil Procedure, I, having this day delivered to said R. H., sheriff, the property, documents and prisoners hereinafter recited, this instrument witnesseth, that I have, as late sheriff as aforesaid, this day delivered possession, and set over unto the said R. H., sheriff—

1. The jail of the county of _____, with all its appurtenances, and the following property of the county therein, to wit (here insert an inventory of the county personal property in the jail, and its appurtenances):

2. The following prisoners, now confined in the said jail, viz. (here insert the name of each prisoner, adding the cause of confinement, and nature of process on which committed):

3. The following processes, orders, commitments, papers and documents, authorizing or relating to the confinement or custody of any prisoner, to wit (here describe the same fully, and in case any such process, order, or commitment has been returned, state the contents thereof, and when and where returned):

4. The following mandates now in my hands, and which I have not executed, or begun to execute, by the collection of money thereon, or by the seizure of or levy on money or other property, in pursuance thereof, to wit (here insert a full description of all such mandates).

Witness my hand this _____ day of _____, 18 .

A. B.,

Late Sheriff of the County of _____.

No. 35.

Certificate of Resistance to Process.

(See pages 99, 190.)

To (naming court, from which process issued):

I hereby certify that the following-named persons have resisted, and aided and abetted in the resistance, of (here describe the process).

Dated,

R. H.,

Sheriff of the County of _____.

No. 36.

Return on Warrant Issued on Information of Crime.

(See page 103.)

County, ss.:

I certify that I have arrested the defendant named in the

within (or annexed) warrant, and * have him now in my custody before the magistrate issuing such warrant.

(Where the magistrate issuing the warrant is absent or unable to act, add after the * "the magistrate issuing the warrant being absent" [or unable to act, as the case may be], "have him now in my custody, before A. B., justice of the peace of the town of , county of ") or other magistrate, as the case may be).

(Where the defendant has been let to bail by a magistrate other than the one issuing the warrant, add after the * "he has been let to bail upon the undertaking returned herewith."

Dated,

R. H.,

Sheriff of the County of

(And if made by under-sheriff or deputy, add, "by A. B., under-sheriff or deputy").

No. 37.

Return on Bench Warrant for Arraignment.

(See pages 104, 105.)

Same as no No. 36 down to *, then add, "have him now in my custody before the court named in the warrant, as therein directed."

(If the defendant has given bail before a magistrate of another county, add after the *, "he has been let to bail upon the undertaking returned herewith.")

(If the court before which the warrant commands the defendant to be taken has adjourned for the term, add after the *, "the court before which the warrant directs the defendant to be taken, having adjourned for the term, I have delivered him into the custody of the sheriff of the county of " [or in the city and county of New York, "to the keeper of the city prison of the city of New York"], "pursuant to the commands of the warrant in such case.")

Dated,

R. H.,

Sheriff of the County of

(If made by under-sheriff or deputy, add, "by A. B., under-sheriff," or "deputy.")

No. 38.*Return on Bench Warrant for Judgment.*

(See page 106.)

Same as No. 36 down to the *, then add, "have him now in my custody before the court named in the warrant, as therein directed."

(If the court has adjourned for the term, add after the *, "the court before which I am directed by the warrant to produce said defendant, having adjourned for the term, I have delivered him into the custody of the sheriff of the county of " [or in the city and county of New York, "to the keeper of the city prison of the city of New York"], "pursuant to the commands of the warrant, in such case.")

Dated,

R. M.,

Sheriff of the County of .

(If by under-sheriff or deputy, add, "by A. B., deputy," or "under-sheriff.")

No. 39.*Return on Order for Re-commitment.*

(See page 107.)

County of , ss.:

I certify, that I have arrested the defendant named in the within (or annexed) order, and * have committed him to the custody of (naming officer in whose custody he was when admitted to bail), pursuant to the commands of the order.

(If the order *do not* recite, as the ground upon which it is made, the failure of the defendant to appear for judgment, upon conviction, and the crime is bailable, and bail be given as prescribed in the order, add after the *, "the defendant has been let to bail, pursuant to said order, by the under-taking returned herewith.")

Dated,

R. H.,

Sheriff of the County of .

(And if by under-sheriff or deputy, add, "by A. B., under-sheriff," or "deputy.")

No. 40.*Return on Governor's Warrant for Fugitive from Justice.*

(See page 111.)

County of _____, ss.:

I certify that I have arrested the defendant named in the annexed (or within) warrant, pursuant to the command thereof, and have * surrendered him to _____, the duly authorized agent of the State [or territory] of _____, as in said warrant directed. (If no agent has appeared to receive the fugitive, add after the *, "committed him to the custody of the [naming keeper of the jail or prison where committed]" or, "brought him here before _____, justice of the Supreme Court, to be let to bail)."

Dated, _____

R. H.,

Sheriff of the County of _____.

(And if by under-sheriff or deputy, add, "by A. B., under-sheriff," or "deputy.")

No. 41.*Return on Warrant for Fugitives from Foreign Country.*

(See page 113.)

Same as No. 40 down to the *, then add, "him here before the judge who issued the warrant." (If let to bail by another judge than the one issuing warrant, add after the word "and" before the *, "he has been let to bail by" [naming the judge] "upon the undertaking herewith returned)."

Dated, _____

(Signature.)

No. 42.*Return on Peace Warrant.*

(See page 115.)

County of _____, ss.:

I certify that I have arrested the defendant named in the

within (or "annexed") warrant, and have him now in my custody before the magistrate issuing said warrant.

Dated,

R. H.,
Sheriff of the County of .

(Or, if by under-sheriff or deputy, add, "by A. B., under-sheriff" or "deputy.")

No. 43.

Return on Warrant in Bastardy Proceedings.

(See page 116.)

County of , ss.:

I certify that I have arrested the defendant named in the within (or annexed) warrant, and * have him now in my custody before the magistrate issuing said warrant.

(If the magistrate issuing such warrant is absent or unable to act, add after the *, "the magistrate issuing said warrant being absent" [or, "unable to act"], "I have the defendant now in my custody before [naming magistrate, and adding his title] the nearest [or "most accessible"] magistrate in the same county.")

(When the arrest is made in a county other than where warrant issued and bail is taken in such county, add after the *, "took him before [naming magistrate in county where arrested, adding title], who let the defendant to bail, upon the undertaking herewith returned.")

Dated,

R. H.,
Sheriff of the County of .

(If by under-sheriff or deputy, add, "by A. B., under-sheriff" or "deputy.")

No. 44.*Return on Warrant for Disorderly Person.*

(See page 117.)

Same as No. 42, *ante*.**No. 45.***Return on Search Warrant.*

(See page 122.)

County of , ss.:

I certify that I have executed the within (or annexed) warrant, by seizing the property named in the following (or annexed) inventory, which property is here produced before the magistrate issuing said warrant. That such property was taken by me from A. B., in whose possession I found it, and a receipt given to him therefor. That I found said property in the house occupied by said A. B., No. 20 Madison street, in the village (or city) of , in said county (or as the case may be).

(Date and signature as in No. 43, *ante*.)*Inventory of Property Seized by Virtue of the Annexed (or Foregoing) Warrant.*

(Here describe fully each and all articles taken.)

County of , ss.:

I, R. H., the officer by whom the annexed (or "foregoing") warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant, which inventory was publicly made (or "was made in the presence of A. B., from whom such property was taken, and of C. D., the applicant for such warrant").

Subscribed and sworn to before me, }
 this day of , 18 . }

R. H.

(If the property was not found, return that fact, stating that search has been made therefor, and where made.)

No. 46.*Return, on Warrant to Obtain Books and Papers from an ex-Officer.*

(See pages 87, 123.)

County of , ss.:

I certify that I have executed the within (or "annexed") warrant by searching the places therein designated for the books and papers therein named, *, and have seized and now produce before the officer issuing said warrant the following, to wit (here describe books and papers seized); (where no books and papers are found, add after *, "and have been unable to find the same, or any of them").

Dated,

R. H.,

Sheriff of the County of

(If by under-sheriff or deputy, add, "by A. B., under-sheriff, or deputy").

No. 47.*Return on Warrant to Search for Gaming Devices.*

(See page 124.)

County of , ss.:

I certify that I have executed the within (or "annexed") warrant by making diligent search for the articles therein specified, at the place (or "places") therein designated (or "upon the person therein named," as the case may be), and *, have found and seized, and now produce before the magistrate issuing said warrant, the following, to wit (here insert full and detailed description of articles seized); (if nothing is found, add after *: "I have been unable to find any of said articles").

Dated,

(Signed as last form.)

No. 48*Return on Warrant to Search for Obscene Prints, etc.*

(See pages 125, 126.)

(Same as No. 47, *ante.*)**No. 49.***Return on Summons against Corporations in Criminal Proceedings.*

(See page 127.)

County of , ss.:

I certify, that on the day of , 18 , at , I served the within (or annexed) summons, upon , president (or other head—or “secretary,” “cashier,” or “managing agent,” as the case may be), of the within-named corporation, by exhibiting to him the within (or annexed) original, and at the same time delivering to, and leaving with him, personally, a copy thereof.

That the person so by me served is known to me to be such officer of said corporation.

Dated,

R. H.,
Sheriff of the County of .

(If by under-sheriff or deputy, add, “by A. B., under-sheriff,” or “deputy.”)

No. 51.

Account for County Treasurer of Materials, etc., Purchased for Employment of Disorderly Persons.

(See pages 169, 170.)

The County of , to R. H., Sheriff, Dr.

To (herespecify materials, itemizing same), furnished pursuant to an order of the court of sessions, dated the day of , 18 , a copy of which is annexed.

County of , ss.:

R. H., sheriff of the said county, being sworn, says, that the foregoing account is a correct statement of articles furnished by deponent, under the order, a copy of which is annexed.

R. H.

Subscribed and sworn to before me, }
 this day of , 18 . }

No. 52.

Report of Sheriff to Court of Sessions, or to Board of Supervisors, as to Labor, etc., of Disorderly Persons..

(See pages 169, 170.)

To the Court of Sessions of the County of (or, "To the Board of Supervisors of County," as the case may be):

The following is a correct account of implements and materials furnished, pursuant to the order of the court of sessions of county, for the labor of disorderly persons confined in the jail of said county, which order bears date January 2, 1883.

R. H., Sheriff of the County of , in account with
 County.

Dr.

1883. Jan. 4.	To cash from County Treasurer....	\$200 00
April 2.	To proceeds of labor of convicts,	
	above cost.....	25 00
		<hr/> \$225 00

CR.

1883. April 2. By repaid County Treasurer	
cost, as above	\$200 00
By paid County Treasurer	
one-half surplus..	12 50
By paid J. D., convict, his	
share of proceeds.....	12 50
	————— \$225 00
	=====

County of , ss.:

R. H., sheriff of said county, being sworn, says: that the foregoing account of materials and implements furnished by me, under the order of the court, made on the day of , 18 , and the proceeds of the labor of disorderly persons, and the disposition thereof, is true in all respects.

R. H.

Subscribed and sworn to before me, {
this day of , 18 . }

No. 53.

Inquisition as to Sanity of Prisoner Sentenced to Death.

STATE OF NEW YORK, {
County of , } ss.:

Inquisition taken before the undersigned sheriff of the county of , with the concurrence, and pursuant to the order of , justice of the Supreme Court (or "county judge of county"), to examine the question of the sanity of A. B., sentenced to the punishment of death, and now confined in the jail of said county, taken at the said jail, on the day of , 18 , upon the oaths of (here insert names of jurors) twelve persons of said county, qualified to serve as jurors in a court of record, duly summoned by me for the purpose aforesaid.

The said jurors being each duly sworn to inquire as to the sanity of said prisoner, upon their oaths say, that the said A. B. is not of sane mind (or "is of sane mind," as the case may be).

In witness whereof, we, the said jurors as well as said sheriff, have hereto set our hands and seals, at the time and place above mentioned.

R. H., *Sheriff*. [L. S.]

(Here let jurors sign, with seal for each juror.)

[L. S.] }
 [L. S.] }
 [L. S.] } *Jurors.*
 [L. S.] }

No. 54.

Notice to District Attorney of Inquest, as to Sanity (or Pregnancy) of Prisoner.

(See page 177.)

To C. M. P., *District Attorney of the County of* :

SIR—Take notice, that with the concurrence of J. S. L., county judge of Fulton county (or “justice of the Supreme Court”), I shall proceed to hold an inquest, at the jail of the county of , on the day of 18 , at 10 o’clock A. M., touching the sanity (or “pregnancy”) of A. B., now confined in said jail, under sentence of death.

Dated,

R. H.,
Sheriff of the County of .

No. 55.

Oath to Jurors on Inquest as to Sanity (or Pregnancy) of Prisoner.

(See page 177.)

You do each of you swear, that you will well and truly inquire as to the sanity (or “pregnancy”) of A. B., the prisoner now here, and a true inquest make thereof, according to the evidence, so help you God.

No. 56.*Oath to Witness on Inquisition as to Sanity (or Pregnancy of Prisoner.)*

(See page 177.)

You do swear that the testimony you shall give, upon this inquest, touching the sanity (or "pregnancy") of A. B., the prisoner now here, shall be the truth, the whole truth, and nothing but the truth, so help you God.

No. 57.*Oath to Juror when Challenged on Inquest as to Sanity (or Pregnancy) of Prisoner.*

(See page 177.)

You do swear that you will true answers make, to such questions as shall be put to you, touching the objection or challenge to you as a juror, so help you God.

No. 58.*Oath to Witness, on Challenge to Juror, on Inquest as to Sanity (or Pregnancy) of Prisoner.*

(See page 177.)

You do swear that you will true answers make, to such questions as shall be put to you, touching the challenge of J. D., a juror, so help you God.

No. 59.*Inquisition as to Pregnancy of Prisoner Sentenced to Death.*

(See page 177.)

STATE OF NEW YORK, }
 County of , } ss.:

Inquisition taken before the undersigned, sheriff of the county of , with the concurrence of , justice of the Supreme Court (or "county judge of county") to

examine whether A. B., a female under sentence of death, and now confined in the jail of said county, be pregnant; taken at the said jail, on the day of , 18 , upon the oaths of (here insert names of jurors, and county where each is resident), six physicians, duly summoned by me for the purpose aforesaid.

The said jurors, being each duly sworn, to inquire as to the pregnancy of said prisoner, upon their oaths, say, that the said A. B., is now pregnant (or is now not pregnant).

In witness whereof, we, the said jurors, as well as the said sheriff, have hereto set our hands and seals at the time and place aforesaid.

R. H., *Sheriff*, [L. S.]

(Each juror signing and sealing.)

[L. S.]	} <i>Jurors.</i>
[L. S.]	
[L. S.]	

No. 60.

Invitation to Attend Execution of Death Sentence.

(See page 178.)

SIR—You are invited to be present at the execution of the sentence of death upon A. B., at the jail of the county of , on the day of , 18 , at o'clock, . M.
Dated,

R. H.,
Sheriff of the County of .

No. 61.

Certificate of Execution of Death Sentence.

(See page 179.)

STATE OF NEW YORK, } ss.:
County of .

I, R. H., sheriff of the county of , do hereby certify, that pursuant to the commands of a warrant to me directed and delivered, I have executed the sentence of the court of oyer and terminer, held in and for the county of , on the day of , 18 , upon A. B.; and that in the

execution thereof, in conformity thereto, I did, on the day of , 18 , between the hours of o'clock in the morning and o'clock in the afternoon, within the walls of the prison of the county of (or, "within a yard or inclosure adjoining the prison of the county of "), hang the said A. B. by the neck until he was dead.

That said execution was witnessed by the officials, physicians and citizens whose names are hereto subscribed, upon my invitation to them to be present.

In witness whereof, we, the undersigned officials, physicians and citizens, have hereto subscribed our names, as well as the said sheriff, and we, the said officials, physicians and citizens, do certify to the truth of the matters set forth in the foregoing certificate, this day of , 18 , at the jail in the county of .

R. H.,
Sheriff.

G. D.,
County Judge of County.

L. S.,
District Attorney of the County of .

P. D.,
Clerk of the County of .
(Add signatures of physicians and citizens.)

No. 62.

Certificate of Service of Subpœna in Criminal Action or Proceeding.

[By showing original and delivering a copy.]

(See page 182.)

County of , ss.:

I certify, that at the times and places hereinafter named, I served the annexed (or within) subpœna on the following persons therein named, viz.:

On at , N. Y.; on the day of , 18 .

(On at , N. Y., on the day of , 18 .

By delivering a copy thereof to and leaving it with each

of said persons, and at the same time exhibiting to each the annexed (or within) original.

Dated,

R. H.,

Sheriff of the County of .

(If by under-sheriff or deputy, add, "by A. B., under-sheriff," or "deputy.")

No. 63.

Certificate of Service of Subpœna in Criminal Action or Proceeding.

[By delivery of original to witness.]

(See page 182.)

County of , ss.:

I certify, that on the day of , 18 , at , N. Y., I served the subpœna, of which the annexed (or within) is a copy, upon A. B., within named, by delivering such original subpœna to, and leaving it with, the said A. B., personally.

Dated,

(Signed as in last form.)

No. 64.

Receipt of Mandate, to Party Delivering it.

(See page 187.)

This may be upon a copy of the mandate as follows, viz.:
Received this day of , 18 , at hours, and
minutes, . M., a (naming the mandate) of which
the within is a copy, from A. B., Plff's Att'y.

R. H.;

Sheriff of the County of .

(By, etc., .)

Or, in the following form, viz.:

SUPREME COURT :

John Doe, Plaintiff,

agst.

Richard Roe, Defendant.

Received this day of , 18 , at hours and
 minutes, , M., from A. B., Plff's Att'y (naming
 mandate), in the above entitled action, bearing date the
 day of , 18 .

R. H., *Sheriff, etc.*

(By, etc., .)

No. 65.*Certificate on Copy Mandate (or Other Paper).*

(See page 187.)

County of , *ss.:*

I certify that the within (or annexed) is a true copy of
 (naming mandate or other paper), and of the whole thereof.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 66.*Certificate of Service of Summons (and Complaint) on Individual.*

(See pages 193, 209.)

County of , *ss.:*

I certify that on the^t day of , 18 , at ,
 in the county of , I served the annexed (or within)
 summons (and where complaint is served with summons,
 add together with the annexed [or within] complaint) on
 A. B., the defendant (or one of the defendants), in said
 summons named, by delivering to and leaving with† him,
 personally, copies thereof.*

Dated,

R. H.,

Sheriff of the County of .

(By, etc., .)

No. 67.

Certificate of Service of Summons (and Complaint) on More Than one Individual.

(See pages 193, 209.)

County of , ss.:

I certify that at the times and the places herinafter named, I served the annexed summons (together with the complaint hereunto annexed) on the following defendants therein named, viz.:

On A. B., at , in the county of , N. Y., on the day of , 18 .

On C. D., at , in the county of , N. Y., on the day of , 18 .

By delivering to and leaving with each of such defendants, personally, a copy of the same.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 68.

Certificate of Service of Summons (and Complaint) on Infant Under Fourteen, or Person Judicially Declared Incompetent.

(See pages 193, 209.)

Same as No. 66 down to *, then add, "and at the same time and place (or, as the case may be), also delivering to, and leaving with, A. B., the father of" or, "the mother of;" or "the guardian of"; or "the person having the care and control of" the defendant (or the person in whose service the defendant is employed), an infant under fourteen years of age, a copy of the same."

Where the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee is appointed, add after *, "and at the same time and place (or, as the case may be), also delivering to, and leaving

with, A. B., the committee of the defendant, a lunatic (or, as the case may be), a copy of the same."

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 69.

Certificate of Service of Summons (and Complaint) on Infant fourteen years or over, or Incompetent Person not so Judicially Declared.

(See pages 193, 209.)

Same as No. 66 down to *, then add, in cases where some person has been designated by order to be also served, "and at the same time and place (or, as the case may be), also delivering to, and leaving with A. B., of , in the county of , N. Y., a copy of the same."

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 70.

Certificate of Service of Summons (and Complaint) on Domestic Corporation.

(See pages 198, 209.)

Same as No. 66 down to †, then add "A. B., president (or, as the case may be), of the defendant, corporation."

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 71.

Certificate of Service of Summons (and Complaint) on Foreign Corporation.

(See pages 199-209.)

Same as No. 66 down to †, adding "A. B., president, (or, as the case may be), of the defendant, corporation," or "C.

D., of No. Street, in the county of , N. Y.," in
case a designation is made by such corporation.

Dated,

R. H., *Sheriff, etc.*
 (By, etc., .)

No. 72.

Certificate of Service of Process to Commence Special Proceeding.

(See pages 201, 209.)

(The foregoing forms as to service of summons, apply equally to service of any process or paper whereby a special proceeding is instituted.)

No. 73.

Certificate of Inability to Serve.

(See pages 202, 209.)

County of , ss.:

I certify that I have made proper and diligent effort to serve the annexed (or within) summons, upon the within-named defendant by (here state what effort has been made), and that (the place of his sojourn cannot be ascertained; or, if he is within the State, that he avoids the service, so that personal service cannot be made).

Dated.

R. H., *Sheriff, etc.*
 (By, etc., .)

No. 74.

Certificate of Substituted Service of Summons and Order.

(See pages 203, 209.)

County of , ss.:

I certify that on the day of , 18 , at , in the county of , N. Y., I served the annexed (or within) summons, on A. B., the defendant therein named, by (delivering to, and leaving with C. D., a person of proper

age, at the residence of the said defendant, a copy the , and of the order thereto annexed), or (by affixing a copy thereof, and of the order thereto annexed, to the outer door [or other door, as the case may be], of the residence of the said defendant, admittance to said residence being refused), or (no person of proper age being found in such residence, who would receive the same), and by depositing another copy thereof, and of said order, properly inclosed in a post-paid wrapper, addressed to said defendant at his place of residence, in the post-office, at said place where he resides).

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 75.

Certificate of Service of Subpœna on More than One.

(See pages 204, 209.)

County of , ss.:

I certify that I did, at the times and places below set forth, serve the annexed (or within) subpœna upon the persons below named, witnesses in said subpœna mentioned, and to whom the same is directed, by showing the said subpœna to each of such witnesses, and delivering to and leaving with each a subpœna ticket, containing the substance thereof (or a copy thereof, as the case may be), and paying to each the sum of money set opposite his name, as and for the traveling fees of such witness from his residence to the place mentioned in said subpœna, and one days attendance; that said witnesses reside respectively at the place where subpœnaed (except A. B., who resides at), viz.:

On A. B., at , in the county of , N. Y., amount paid, \$.

On C. D., at , in the county of , N. Y., amount paid, \$.

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 76.*Certificate of Service of Subpœna on One.*

(See pages 204, 209.)

County of , ss.:

I certify that I did, on the day of , 18 , at , in the county of , N. Y., serve the annexed (or within) subpœna on A. B., therein named, by showing the same to him, and at the same time delivering to, and leaving with him, a subpœna ticket containing the substance thereof (or a copy thereof), and paying to him the sum of \$, for his traveling fees from his residence to the place in said subpœna named, and one days attendance; that said witness resides at .

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 77.*Certificate of Service of Subpœna Duces Tecum.*

(See pages 204, 209.)

Same as No. 76, substituting instead of the words "and leaving with him a subpœna ticket containing the substance thereof," as follows, viz.: "By leaving with him a copy thereof."

No. 78.*Certificate of Service of Injunction Order.*

(See page 209.)

County of , ss.:

I certify that on the day of , 18 , at , in the county of , N. Y., I served the annexed (or within) order on A. B., by exhibiting to him the annexed (or within) order, and the signature of Hon. J. D., justice of the Supreme Court (or, as the case may be), thereto, and at the same time delivering to, and leaving with, him personally, a copy of said order, and of the affidavits hereto annexed, upon which said order was granted.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 79.

Undertaking on Arrest in Civil Action.

(See pages 239, 240.)

(Title of cause.)

Whereas, the above-named defendant, A. B., under an order dated the day of , 18 , has been arrested in the above entitled action, by the sheriff of the county of .

Now, therefore, we, C. D. (here state occupation) of (here state residence by town, county, city or village, and if city or village, street and number, if any) and E. F. (here state occupation) of (here state residence, as above), do hereby, jointly and severally undertake, in the sum of dollars (insert the sum stated in the order of arrest);* that the defendant, A. B., will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment against him in the action.

Dated, , 18 .

C. D.

E. F.

County of , ss.:

On this day of , 18 , before me personally came C. D. and E. F., to me known to be the same persons described in, and who executed the foregoing undertaking, and severally acknowledged the execution thereof.

County of , ss.:

C. D. and E. F., the above-named sureties, being severally duly sworn, say, and each says, that he is a resident of the State of New York, and a freeholder (or householder) therein, and is worth the sum of (here insert the sum specified in order of arrest, unless there are more than two sureties, when the whole amount that all justify in, must equal said sum), exclusive of his property exempt from execution.

C. D.

E. F.

Severally subscribed and sworn to before)
me, this day of , 18 .)

(The justification is not necessary, and may or may not be added.)

If the order of arrest could be granted only by the court, the undertaking is the same as above, down to *, adding thereafter as follows, to wit:

“That the defendant, A. B., will obey the direction of the court granting the order of arrest, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the judgment; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.”

(Date, signatures, acknowledgment and justification as above.)

If the action is to recover a chattel, the undertaking is the same down to *, adding as follows, to wit:

“That the defendant, A. B., will deliver the chattel, to recover which this action is brought, to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.”

(Date, signatures, acknowledgment and justification as above.)

No. 80.

Examination of Bail at Instance of Sheriff.

(See page 240.)

(Title of cause.)

Examination of C. D. and E. F., the persons executing the annexed undertaking, under oath, to wit:

County of , ss.:

C. D., of , being duly sworn, says:

(Here insert examination by question and answer, or in narrative form.)

C

Taken, subscribed and sworn to before }
me, this day of , 18 . }

No. 81.

Certificate for Copies of Order of Arrest, Return and Undertaking.

(See page 240)

(Same as form No. 65.)

No. 82.*Notice of Justification of Bail.*

(See page 241.)

(Title of cause.)

SIR—Please take notice, that C. D. (state here his occupation), residing at (state here his residence, giving town, city or village, and street and number), and E. F. (here state occupation), residing at (here state residence as above), the bail of the defendant, A. B., herein (or, where other bail is to be given, “the bail proposed by the defendant, A. B., in the place and stead of those executing the undertaking already given”), will justify before R. D., county judge of county, (or, as the case may be), at (naming place), on the day of , 18 , at o'clock, M.

Dated,

R. H., *Sheriff, etc.***No. 83.***Certificate of Deposit in Lieu of Bail.*

(See pages 241, 242)

(Title of cause.)

County of , ss.:

I certify that I have received from A. B., the defendant, the sum of (stating amount), being the sum fixed in the order of arrest herein, as a deposit in lieu of bail.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 84.*Return on Order of Arrest.*

(See pages 243, 244.)

County of , ss.:

I certify that I have arrested the defendant, A. B. (or defendants, A. B. and C. D.), named in the within (or annexed) order, and * have him (or them) now in my custody in the jail of the said county, in default of bail (where bail is

given, add after *): "Have discharged him upon his giving the undertaking by said order required."

(Where deposit is given in lieu of bail, add after *) "Have discharged him upon his depositing, with me, the sum of _____, in lieu of the bail by said order required."

(Where there is more than one defendant, and all are not arrested, the return is made on a copy of the order, and is the same as above, except instead of the words "within order," substitute "the order of which the within is a copy," and add: "I have not been able to find the defendant, C. D., in my county.")

(Where no arrest is made on account of not finding the defendant or defendants.)

County of _____, ss.:

I certify that the within named defendant, A. B. (or defendants, A. B. and C. D.), is (or are) not to be found within my county.

(Where there has been a rescue after arrest, add after *), "That the said defendant, A. B. (or defendants, A. B. and C. D.), was (or were) taken from my custody, with force and arms, on the _____ day of _____, 18____, by divers persons to me unknown, and then and there the said defendant (or defendants) rescued himself (or themselves), and escaped out of my custody, and has (or have) not since been found in my county."

Dated,

R. H., *Sheriff, etc.*

(By, etc., _____.)

No. 85.

Certificate of Surrender of Defendant by Bail.

(See page 245.)

County of _____, ss.:

I certify that A. B., the principal named in the within (or annexed) undertaking (or, describe undertaking, if not present), has * been surrendered to me, by C. D. and E. F., his bail, and I now have him in my custody, this _____ day of _____, 18____.

R. H., *Sheriff, etc.*

No. 86.*Certificate of Voluntary Surrender by Defendant in Exoneration of his Bail.*

(See page 246.)

Same as No. 85 to *, then add, "this day of , 18 , voluntarily surrendered himself to me in exoneration of his bail in said undertaking, and I now have him in my custody.

R. H., *Sheriff, etc.*

No. 87.*Notice of Levy upon Real Estate by Warrant of Attachment.*

(See pages 255, 256.)

(Title of cause, including names of all the parties.)

Notice is hereby given, that a warrant of attachment against the property of the defendant, A. B., has been issued in the above entitled action; that the amount of the plaintiff's claim, as stated in said warrant, is the sum of dollars, with interest thereon from the day of , 18 ; that by virtue of said warrant the real estate of said defendant, situated in the county of , and described as follows, is levied upon, to wit: (Here describe real estate sought to be charged.)

Dated,

R. H., *Sheriff, etc.*

L. D., *Plaintiff's Attorney.*

Office address,

No. 88.*Certificate on Copy Warrant of Attachment and Affidavit.*

(See pages 255, 257.)

(Same as No. 65.)

No. 89.

Certificate to Copy Warrant of Attachment, and Notice of Property Attached.

(See page 258.)

County of , ss.:

I certify that the annexed (or within) is a true copy of a warrant of attachment now in my hands for execution, and of the whole thereof.

You are hereby notified, that pursuant to the commands of said warrant, I have attached (here describe the property attached as particularly as may be) now in your possession or under your control (or, in case of a corporation or association "now in the possession, or under the control of" [naming corporation or association]). And you are hereby required, pursuant to the provisions of section 650 of the Code of Civil Procedure, to furnish me with a certificate specifying (in case of stock of association or corporation, "the rights or number of shares of the defendant in the stock of [naming the corporation or association], with all dividends declared, or incumbrances thereon"). (In case of other property "the amount, nature, and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant.")

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 90.

Inventory of Property Attached.

(See pages 261, 279, 280.)

(Title of cause.)

Inventory.

The following is a true inventory of all the property attached in the above entitled action under the warrant of attachment therein dated, , 18 , together with the appraised value thereof, taken by R. H., sheriff of the county of , with the assistance of G. H., of , and I. J., of , disinterested freeholders, to wit: Property

belonging to the defendant, A. B. (Here describe property and give value of each article named.)

(If real property, give a description of it, with estimated value of each parcel, or defendant's interest.)

(If more than one defendant's property, add, "property belonging to the defendant, C. D.," and continue as above.)

Dated,

G. H., }
I. J., } *Appraisers.*
R. H., *Sheriff, etc.*
(By, etc., .)

No. 91.

Return on Warrant of Attachment.

(See page 269.)

County of _____, ss.:

I hereby certify that I have executed the within (or annexed) warrant of attachment, by levying upon (here insert a description of the property seized, or refer to an inventory thereof annexed) belonging to the defendant, A. B. (or, as the case may be). (Where the property is incapable of manual delivery, add: "That I so levied upon the same by delivering to, and leaving with, L. M., the president [or, as the case may be] of, etc. [naming association or corporation], [or "with N. O.," in case of a claim or debt against an individual]), a copy of the said warrant duly certified, together with a notice of such levy, of which certificate and notice the annexed is a copy (attach copy of certificate and notice of levy, Form 89), at _____, in the county of _____, on the _____ day of _____, 18 ____.

That thereupon, and on the _____ day of _____, 18 ____, with the assistance of G. H. and J. J., appraisers, I made an inventory and appraisal of said property, and filed the same in the clerk's office of _____ county.

(In case property seized has been claimed by third person, and, on inquisition, awarded to such person, or any part of the property so claimed and awarded, make return of such claim, inquisition, and release of property to claimant.)

(In case any part of the property has been sold, or perishable, under order of the court, recite that fact, giving date of order, amount of proceeds of sale, etc.)

(In case actions have been commenced on claims attached, or the property has been restored to the defendant, or the attachment vacated or annulled, recite the facts, and recite all the doings under the warrant, from the time of its receipt to the date of the return.)

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 92.

Certificate on copy Affidavit, Requisition and Undertaking, in Replevin.

(See page 286.)

(Same as form No. 65.)

No. 93.

Notice that Sheriff Requires Indemnity on Claim of Third Person, in Replevin.

(See page 289.)

(Title of cause.)

To L. M., Esq., Attorney for Plaintiff:

Take notice, that I require indemnity against the claim of A. B., to property replevied by me in this action, which claim is set forth in the affidavit, with a copy of which you are herewith served.

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 94.

Sheriff's Approval of Undertaking in Replevin.

(See page 285.)

I approve the within undertaking, both as to its form and the sufficiency of the sureties.

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 95.

Return in Replevin.

(See page 292.)

County of , ss.:

I certify that on the day of 18 , at , in the county of , pursuant to the annexed (or within) requisition, I took possession of all the personal property mentioned in the annexed (or within) affidavit (or the following portion of the personal property mentioned in the annexed [or within] affidavit, being all of the property therein mentioned, which I have been, after due diligence, able to find in my county), and, at the same time and place, * I delivered to, and left with the defendant (or with G. H., the agent of the defendant, from whose possession said property was taken, I not being able to find the defendant in my county after making diligent effort,) copies of the annexed (or within) affidavit and requisition, and of the undertaking on the part of the plaintiff herein, approved by me (or add after *).

“Not being able to find in my county the defendant, or his agent (if any), from whose possession said property was taken, I left a copy of the said affidavit and requisition, together with a copy of the undertaking herein on the part of the plaintiff, approved by me, with E. D. (“wife,” or, as the case may be, “of the defendant;” or “of G. K., the agent of the defendant,” or other person of suitable age and discretion, stating who it is, and showing that such person is of suitable age and discretion) “at the usual place of abode of the defendant” (or “of G. H., the agent of the defendant, from whose possession the said property was taken”).

(Add to above, briefly, each subsequent step taken in regard to the property.)

(Where no property is found, make a return of that fact.)

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 96.

Indorsement of Receipt of Execution.

(See pages 295, 308.)

Received this day of , 18 , at hours and
minutes, . M.

R. H., *Sheriff, etc.*
(By, etc., .)

No. 97.

Minute of Receipt of Execution, and Certificate on Copy.

(See page 295.)

Same as form No. 64 (for minute of receipt), and same as form No. 65 (for certificate on copy).

No. 98.

Indorsement of Levy Under Execution.

(See page 336.)

By virtue of the within execution, I have levied, this
day of , 18 , at (here insert particular place
where levy is made), upon the * following property, to wit:
(Here state property in detail; or, where property consists
of numerous articles add after *, "property mentioned in
the annexed schedule.")

R. H., *Sheriff, etc.*
(By, etc., .)

No. 99.*Receipt and Undertaking for Re-delivery of Property
Levied Upon.*

(See pages 341, 342.)

(Title of cause.)

I hereby acknowledge the receipt of (here name property, or refer to schedule annexed), levied upon under an execution in the above action for dollars, on the day of , 18 , by the sheriff of the county of , and promise and undertake that I will deliver the same to said sheriff, on demand, or in default thereof pay to said sheriff the amount directed to be levied by said execution, and costs and fees thereon.

Dated,

(Signed.)

A. B.

If required, add as follows :

We, C. D. and E. F., of , do hereby, in consideration of the property mentioned in the foregoing receipt being left with the said A. B., by the sheriff of the county of , undertake, jointly and severally, that the said A. B., will return the same to the said sheriff, on demand, or pay the amount by him agreed to be paid, or that in default thereof we will pay to the said sheriff the amount directed by the execution before mentioned to be levied, and his costs and fees.

Dated,

(Signed.)

C. D.

G. F.

No. 100.*Notice of Inquest on Claim by Third Person, of Property
Levied Upon or Attached.*

(See pages 263, 347, 348.)

(Title of cause.)

Take notice, that a claim having been made by A. B. to the property (or certain parts, naming same) levied on by me, by virtue of the execution (or attachment) issued in the above action, and that I shall proceed to empanel a jury to

try said claim, and that the same will be tried at , on
the day of , 18 , at o'clock M.

Dated,

Yours, etc.,

R. H., *Sheriff, etc.*

(By, etc., .)

*To A. B., Claimant,
C. D., Plaintiff's Attorney,
E. F., Defendant.*

No. 101.

*Oath to Jurors on Claim of Third Person to Property
Levied Upon or Attached.*

(See pages 28, 62, 63, 263, 347, 348.)

You, and each of you, do swear, that you will well and truly try the claim of A. B. to the property (or some part of it) levied by the sheriff of county, under the execution (or attachment) in favor of G. H., plaintiff, against E. F., defendant, and true inquisition make, according to the evidence, so help you God.

No 102.

Oath to Witness on Claim of Third Person Attached.

(See pages 28, 62, 63, 263, 347, 348.)

You do swear that the evidence you shall give touching the claim of A. B. to the property (or some part of it) levied by the sheriff of county, under the execution (or attachment) in favor of G. H., plaintiff, against E. F., defendant, shall be the truth, the whole truth and nothing but the truth, so help you God.

No. 103.

*Inquisition on Trial of Claim of Third Person to Property
Levied upon or Attached.*

(See pages 28, 263, 347, 348.)

(Title of cause.)

We, who have hereto signed our names, being duly sum-

moned and sworn as jurors by the sheriff of the county of _____, to try the claim of A. B., to the property levied upon (or some part thereof) by virtue of an execution (or attachment) issued in the above entitled action in favor of G. H., plaintiff, against E. F., defendant, to wit (here describe the property), having heard the testimony offered upon said claim, for and against, do say upon our oaths, and find that the title to said property is (or is not) in the said A. B., claimant.

Witness our hands and seals, at _____, this _____ day of _____, 18 ____.

(Signed and sealed by each juror.)

R. H., *Sheriff, etc.*

(By, etc., _____.)

No. 104.

Bond of Indemnity Against Levy by Execution or Attachment.

(See pages 263, 348.)

(The penal part as in No. 11.)

Whereas, an execution (or attachment) has been issued in an action in the Supreme Court, wherein the above bounden G. H. is plaintiff, and E. F. is defendant, and the amount to be made therein is _____, and the same is now in the hands of said sheriff for execution; and,

Whereas, the said sheriff has levied upon the following property, thereunder (here insert description of property seized); and,

Whereas, A. B. claims title thereto, and a jury duly summoned and sworn by said sheriff, by their inquisition, found the title to said property in said A. B., claimant; and the said G. M., insists that said levy be not released;

Now, therefore, the condition of this obligation is such, that if the said G. H. shall, at all times, keep and save harmless, and fully indemnify the said sheriff, his agents, servants, under-sheriff and deputy, of and from all damages, costs, suits, judgments or other thing, arising out of his failure to relinquish said levy, then this obligation to be void; else to remain in force.

(Signed, sealed, acknowledged, and justification added as in form No. 79.)

No. 105.*Sheriff's Subpœna.*

(See pages 28, 53-59, 263, 347.)

The People of the State of New York, to (here insert names of witnesses), *Greeting :*

You are hereby required, personally, to be and attend before me, at _____, on the _____ day of _____, 18____, at _____ o'clock, . M.; and then and there * to testify what you may know in a certain proceeding then and there pending to try the title to certain property claimed by _____. Hereof fail not at your peril.

Given under my hand, this _____ day of _____, 18____.

R. H.,

Sheriff of _____ County.

No. 106.*Subpœna Ticket.*

(For Subpœna Form No. 105.)

By virtue of a writ of subpœna, herewith shown you, you are hereby required, personally, to be and appear before me, at _____, on the _____ day of _____, 18____, at _____ o'clock, . M., then and there to testify what you may know, in a proceeding to * try the title to certain property claimed by _____.

Dated,

Witness _____.

R. H.,

Sheriff of _____ County.

To Mr. _____.

No. 107.*Subpœna Duces Tecum.*

(See pages 28, 53-59, 263, 347.)

Same as No. 105 down to *, then add, "to bring with you and produce (here describe the books and papers, or other thing required), in a certain proceeding," etc. (closing as in No. 105).

(A copy of this subpœna is served on the witness.)

No. 108.

Notice of Sale of Personal Property; and of Adjournment.

(See pages 350, 352.)

County of , ss.:

By virtue of an execution (or, of several executions) issued out of the court, and to me directed and delivered, I have levied on and taken the following property (or, I have levied on and taken all the right, title and interest of A. B., in and to the following property), to wit: (here describe property to be sold), which I shall sell, at public auction, on the day of , 18 , at o'clock in noon, at (naming the particular place), in the town of county aforesaid.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

In case of adjournment of sale add at foot of above :

The following sale is postponed to the day of , 18 , at o'clock in the noon, at the same place above named.

Dated,

(Signed.)

No. 109.

Notice of Levy on Real Property Upon Judgment After Ten Years.

(See page 358.)

(Title of cause.)

To whom it may concern: Take notice, that judgment was recovered in the above action, in favor of A. B., plaintiff, against C. D., defendant, for the sum of dollars damages and dollars costs, in all for dollars, and the judgment-roll filed in the office of the clerk of the county of , on the day of , 18 .

That said judgment was docketed in the said clerk's office on the day of , 18 .

That on the day of , 18 , an execution on said judgment was issued and delivered to me, whereby I am commanded to make out of the property of the said defendant, C. D. (or the real property or chattel real of E. L.,

heir or devisee of said C. D., as the case may be); and that pursuant to the command of said execution I have levied upon all the right, title and interest of the said C. D., defendant, in and to all the following described real estate, situated in the county of _____, to wit: (here insert description [or, all the right, title and interest of E. F., heir or devisee, as the case may be, of the said C. D., deceased].)

Dated,

R. H., *Sheriff, etc.*

(By, etc., _____.)

No. 110

Notice of Sale of Real Property.

(See page 362.)

Sheriff's Sale.

County of _____, ss.:

By virtue of an execution (or several executions) issued out of the Supreme Court (or other court) against the property of C. D., I have seized all the right, title and interest which the said C. D. had in and to the following described real property, on the _____ day of _____, 18 ____; and I shall sell the same, at public auction, on the _____ day of _____, 18 ____, at _____ o'clock, _____ M., at the (here name place of sale), to wit: (here insert description of the property).

Dated,

R. H., *Sheriff, etc.*

(By, etc., _____.)

When postponed add (where adjourned day will permit of further publication), as follows, to wit:

The above sale is postponed to the _____ day of _____, 18 ____, at the same hour and place.

Dated,

R. H., *Sheriff, etc.*

(By, etc., _____.)

No. 111.

Certificate of Sale.

(See page 365.)

I, R. H., sheriff of the county of _____ do hereby certify, that by virtue of *an execution issued out of the Supreme

Court, bearing date the day of , 18 , I was commanded to make of the personal and real property of A. B., the sum of dollars and cents, which C. D. had recovered against the said A. B. in an action in said court, for damages and costs, and for which a judgment was entered in the clerk's office of the county of , on the day of , 18 , and duly docketed in the clerk's office of the county of , on the day of , 18 ; and for want of sufficient personal property of the said judgment debtor to make the said sum, that then I should cause the same to be made out of the real property whereof the said judgment debtor was seized on the said day of , 18 , or at any time thereafter. That for want of sufficient personal property, out of which to make the said sum, I seized the right, title and interest of the said judgment debtor in and to the following described real property, to wit: (here describe real estate, and if more than one parcel describe separately), and having duly advertised the sale of the same pursuant to the statute, I did expose the same for sale at public auction, on the day of , 18 , (if more than one parcel "in separate parcels as above described") and the same were then and there (or, if separate parcels sold to different persons, "the first parcel herein above described was then and there") struck off to , for dollars, he being the highest bidder therefor, and that being the whole consideration paid (where there are separate parcels "the second parcel herein above described was then and there struck off to , for dollars, he being the highest bidder therefor, and that being the whole consideration paid." Where more than one parcel sold add "the whole consideration for all of said real property, sold being the sum of dollars.")

And I do further certify that said will be (if more than one parcel, "that the said , and will each be,") entitled to a deed of said real property (if more than one parcel sold add "so sold to him as aforesaid") from me, as such sheriff, at the expiration of fifteen months from the date hereof, unless redeemed.

Dated,

R. H. [L. S.], *Sheriff, etc.*

(By, etc., .)

(Where there is more than one execution add after *
 “several executions,” and then describe each separately,
 and the judgment on which each issued.)

County of , ss.:

On this day of , 18 , before me came R. H.,
 known to me to be the sheriff (or the deputy sheriff of
 sheriff) of the county of , and the same person who
 executed the foregoing instrument, and acknowledged the
 execution thereof.

No. 112.

Certificate of Redemption.

(See page 388.)

(*By Judgment Debtor, Heir, Devisee or Grantee.*)

County of , ss.:

I certify, that on the day of , 18 , A. B. duly
 tendered to me the sum of dollars, being the amount
 of the purchaser's bid, on the sale by me, of the real prop-
 erty hereinafter described, under an execution (or several exe-
 cutions) issued out of the Court, against said A. B. (or
 C. D.) in favor of E. F., on the day of , 18 ,
 (if more than one execution, describe each), with interest
 thereon, at the rate of ten per centum per annum, from the
 time of said sale; and claimed to redeem said property from
 such sale, as judgment debtor (or, as the heir, devisee or
 grantee of the judgment debtor, as the case may be), pur-
 suant to sections 1146 and 1147 of the Code of Civil Pro-
 cedure. That said money so tendered was by me received,
 and that the real property so redeemed is described as fol-
 lows, to wit: (here insert description of premises redeemed.)

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

Add acknowledgement as in Form No. 111.

(*By Judgment Creditor.*)

County of , ss.:

I certify, that on the day of , 18 , A. B. ten-
 dered to me the sum of dollars, being the amount of

the purchaser's bid, on the sale by me of the real property hereinafter described, under an execution (or several executions) issued out of the Court against C. D., in favor of E. F. (if more than one execution, describe each), with interest thereon at the rate of seven per cent per annum from the time of said sale; and presented to me a copy of the docket of a judgment in his favor (or in favor of G. H.) against the said C. D., rendered in the Court, etc., on the day of , 18 , for the sum of dollars, and costs, duly certified by the county clerk, under which judgment the said A. B. claimed the right to redeem said real property from said sale (if the judgment was assigned to A. B., then add "also an assignment of said judgment from C. H., duly acknowledged," or "proved by the affidavit of said A. B." or "by the affidavit of the subscribing witness thereto," as to its execution.") (If more than one assignment, recite each, as above); and the affidavit of said A. B. (or of I. J., the attorney or agent of said A. B.), stating the sum remaining unpaid on said judgment; and the said A. B. claimed to redeem the said real property from said sale, and delivered to me a certificate of the satisfaction of his said judgment pursuant to section 1463 of the Code of Civil Procedure, as to its contents and execution.

Whereupon I received the money, so to me tendered by the said A. B.

The real property sold and claimed to be redeemed, as aforesaid, is described as follows, to wit: (Here insert description.)

Dated,

R. M., *Sheriff, etc.*

(By, etc., .)

Add acknowledgment as in Form No. 111.

(*By Mortgagee.*)

Same as last, substituting instead of "copy of the docket of a judgment," etc., as follows: "A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk of the county of ;" and thereafter substituting "mortgage" for "judgment" wherever the latter occurs.

(*By County Superintendent or Overseer of the Poor.*)

County of _____, ss.:

I certify that on the _____ day of _____, 18____, A. B., superintendent of the poor of the county of _____ (or "overseer of the poor of," etc., as the case may be), tendered to me the sum of _____ dollars and _____ cents, being the amount of the purchaser's bid, on the sale by me of the real property hereinafter described under an execution (or several executions), issued out of the _____ court against C. D., in favor of E. F. (if more than one execution describe each), with interest thereon at the rate of seven per centum per annum from the time of said sale; and presented to me a copy of an order of the court of sessions of the county of _____, confirming the warrant and seizure of the real property aforesaid seized by him pursuant to title one of chapter twenty of part one of the Revised Statutes, which copy order was duly certified by the clerk of said court; and also the affidavit of said superintendent (or overseer), that such real property is held by him under such warrant and seizure, and that the same had not been discharged, annulled or reversed, but were in full force. And the said superintendent (or overseer) claimed to redeem said real property from said sale.

Whereupon I received the money to me tendered.

The real property sold and claimed to be redeemed, as aforesaid, is described as follows, to wit: (Here describe same.)

R. M., *Sheriff, etc.*

(By, etc., _____.)

Add acknowledgment as in Form No. 111.

No. 113.

Sheriff's Deed on Execution Sale.

(See pages 388, 389.)

This indenture, made the _____ day of _____, in the year of our Lord one thousand eight hundred and _____, between R. H., sheriff of the county of _____ (by L. M., under-sheriff, etc.), of the first part, and A. B., of, etc., of the second part.

Whereas, by virtue of a certain execution (or "of two certain executions," or more, as the case may be), issued out of the court of, etc., at the suit of C. D., plaintiff (or "one at the suit of C. D., plaintiff, and one at the suit of E. F., plaintiff," etc., as the case may be), against G. H., defendant, directed and delivered to the said R. H., sheriff as aforesaid, commanding him, that of the goods and chattels of the said defendant he should cause to be made certain moneys in the said execution specified, and if sufficient goods and chattels could not be found that then he should cause the amount so specified to be made of the lands, tenements, real estate and chattels real, which the said defendant had on a day in the said execution mentioned, or at any time afterwards, in whose hands soever the same might be; and the said R. H., sheriff as aforesaid, in obedience to the command of the said execution did levy on and seize all the estate, right, title and interest which the said defendant so had, of, in and to the premises hereinafter conveyed and described, and on the day of , one thousand eight hundred and , sold the said premises, at public auction, at , in the said county of , having first given public notice of the time and place of such sale by advertising the same according to law, at which sale the said premises were struck off to A. B. (or, where deed is to other than purchaser, here name such other person), for the sum of dollars, the said A. B. being the highest bidder, and that being the highest sum bidden for the same.

(If the purchaser has assigned the certificate of sale, here add: And the said having, by an instrument in writing, bearing date the day of , 18 , duly executed and acknowledged, assigned the certificate of sale given to him upon such purchase, to A. B., party of the second part herein.) Now, this indenture witnesseth: That the said party of the first part, as sheriff as aforesaid, by virtue of the said execution, and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bidden, as aforesaid, to him duly paid, hath sold, and by these presents doth grant and convey unto the said party of the second part, all the estate, right title and interest which the said defendant, G. H. [here name *only* the

defendants whose right, title and interest is directed to be sold by the judgment, where the judgment specifies the particular party, or parties, whose right, title and interest is to be sold thereunder], had, on the day of , one thousand eight hundred and (the date of docketing judgment in county where premises are), or any time afterwards, of, in and to all (here insert description of real property); to have and to hold the said above described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as the said party of the first part aforesaid, can or ought to sell and convey the same, by virtue of the said execution, and the law relating thereto. In witness whereof, the said R. H. hath hereunto set his hand and seal, the day and year first above written.

R. H., *Sheriff, etc.* [L. S.]

(By, etc., .)

Sealed and delivered in }
the presence of }

STATE OF NEW YORK, }
County of , } ss.:

On this day of , A. D. 18 , before me the subscriber personally appeared R. H., to me known to be the same person described in and who executed the above conveyance, and acknowledged the execution thereof, and I certify that I know the said R. H. to be the sheriff (or, under-sheriff, etc.), of the county of .

No. 114.

Return on Execution Against Property.

(See pages 400, 403.)

(Where it is Wholly Unsatisfied.)

The defendant has no goods or chattels, lands or tene-

ments within my county, out of which I can make the amount of the within execution, or any part thereof.

Dated,

R. H.,
Sheriff of the County of .
 (By, etc., .)

Or, "*nulla bona.*"

Dated,

R. H.,
Sheriff of the County of .
 (By, etc., .)

(*Where it is Satisfied in Full.*)

I have made the full amount of the within execution as therein commanded, out of the goods and chattels, lands and tenements of the within named defendant (and where such is the fact, add, "and have paid the same to the within named plaintiff," or "have paid the same into court").

Dated,

R. H.,
Sheriff of the County of .
 (By, etc., .)

Or, "satisfied."

Dated,

R. H.,
Sheriff of the County of .
 (By, etc., .)

(*Where Satisfied in part.*)

I have made the sum of dollars of the within execution out of the goods and chattels, lands and tenements of the within named defendant (and have paid the same to the within named plaintiff , or have paid the same into court), and that the defendant has no goods and chattels, lands and tenements, within my county, out of which I can make the residue thereof.

Dated,

R. H.,
Sheriff of the County of .
 (By, etc., .)

Or, "satisfied as to dollars thereof; *nulla bona* as to the residue."

(Date and signature.)

(*Where Levy but no Sale.*)

I have levied on goods and chattels of the defendant, under the within execution, but have not sold the same for want of bidders (or, "but have not sold the same for the reason that I have been stayed by an appeal," or "by injunction" [or, "but have not sold the same, but have released said levy upon being served with a duly authenticated order of the court, vacating the judgment;," or, "setting aside the execution"]).

(Date and signature.)

(*Where Stayed Before a Levy.*)

I have made no levy upon goods and chattels of the defendant, but have been stayed by an appeal (or injunction).

(Date and signature.)

(In any other case recite the facts.)

No. 115.

Return on Execution Against Person.

(See page 400.)

I have arrested A. B., the within named defendant, pursuant to the command of the within execution, *, and have him now in my custody in the common jail of the county of \

(Where let to bail, or otherwise discharged), add after *, "and have let him to the liberties of the jail of the county of \, upon a bond therefor, duly executed;" or "and have discharged him from my custody upon being duly served with an order discharging him from imprisonment as an insolvent debtor, pursuant to the provisions of the Code of Civil Procedure" (or *other cause of his discharge from imprisonment, as the case may be.*)

(Where not found) "the within named defendant, A B., cannot, after diligent effort, be found in my county," or, "not found."

(Date and signature.)

No. 116.

Return on Habeas Corpus to Testify.

(See page 412.)

County of , ss.:

I, R. H., sheriff, etc., do certify that the prisoner within named is held by me pursuant to (here state authority and cause of detention; or, if practicable, annex copy of commitment, in which case add "the commitment, a copy of which is hereto annexed, and forms a part of this return"), and I now have the said prisoner here before , pursuant to the within writ.

(Date and signature.)

No. 117.

Return to Habeas Corpus or Certiorari.

(See pages 419, 420, 425.)

County of , ss.:

I hereby certify that at the time of the service upon me of the within (or annexed) writ, the said A. B., therein named, was, and still is, in my custody; that the authority and true cause of such imprisonment is as follows (here set forth at large the cause of imprisonment): If held by written authority, add, "that annexed hereto, and forming a part of this return, is a copy of the warrant of commitment" (or other written authority), "by virtue of which said A. B. is by me detained, the original of which is herewith produced.")

If *habeas corpus*, add, "and in obedience to said writ, I have the body of the said A. B. now here before court" (or " judge," etc.).

(Date and signature.)

(Where the Prisoner has been Transferred to the Custody of Another.)

County of , ss.:

I hereby certify that at the time of the service of the within (or annexed) writ upon me, the said A. B., therein

named, was not in my custody, or under my power or restraint; that on the day of , 18 , I had the said prisoner in my custody; that the authority and true cause of such imprisonment was as follows (here set forth at large the cause of imprisonment). (If held by written authority, add, "that annexed hereto, and forming a part of this return, is a copy of the warrant of commitment [or other written authority], by virtue of which I so had and detained the said A. B. in my custody, the original of which is herewith produced"). (If the original is no longer in his hands, state that fact and give the substance thereof.)

That on the day of , 18 , I delivered the body of the said A. B. to , for the following cause, and upon the following authority (here state at large the cause of transfer, and authority therefor, and if by warrant or other written authority, annex thereto a copy, and add: "And I annex hereto, as a part of this return, a copy of the warrant (or other written authority, by virtue of which such transfer was made).

(Date and signature.)

(Where, in case of Habeas Corpus, the Prisoner, too Sick or Infirm.)

Same as first above, adding instead of, "and in obedience to said writ, I have the body of the said A. B. now here," etc., as follows:

"That the said A. B. is now so sick (or infirm) that the production of him would endanger his life (or health), and for that reason I do not now produce his body here, in obedience to said writ.

(Date and signature.)

In case the prisoner has not been transferred to the custody of another, and is not in the custody of the person on whom the writ is served, the return is same as above in case where he is transferred, reciting, instead of transfer, the fact of his not then being in custody, and the reason thereof, for example, "that on the day of , 18 , the said A. B. broke from the jail of the county of , and escaped from my custody, and has not since been retaken."

(*Where Prisoner is Under Sentence of Death.*)

The return is same as first above, except that in case of *habeas corpus*, his body is not produced, and the clause in regard thereto is omitted.

No. 118.

Certificate of Service of Habeas Corpus to Testify or to Inquire into Cause of Detention.

(See pages 411, 417.)

County of _____, ss.:

I certify that on the _____ day of _____, 18____, I served the writ, of which the within (or annexed) is a copy, on _____, the person to whom the same is directed,* by delivering to and leaving with him, personally, the said writ, at

(Where the person to be served cannot, with due diligence, be found, add after *, "by leaving the same at [the jail, or other place where the prisoner is confined], with _____, [keeper of said jail, or _____ a person of proper age, having charge, for the time, of the said prisoner; not having been able, with due diligence, to find the said _____, to whom said writ is directed];† and at the same time paying [or tendering] to him the sum of _____ dollars, his fees or charges for bringing up the prisoner.")

(Where the person upon whom the writ ought to be served keeps himself concealed, or refuses admittance, proceed as first above to *, then add, "by affixing the same in a conspicuous place on the outside of his dwelling-house" (or other place where the prisoner is confined).)

(Where the prisoner is in custody of a sheriff, marshal, coroner or constable the following additional clause must be added: "And delivering to him an undertaking pursuant to section 2000 of the Code of Civil Procedure, a copy of which is hereto annexed.")

NOTE—Where the writ is allowed on the application of the attorney-general, or a district-attorney, no fees need be tendered, and no undertaking given.

No. 119.

Certificate of Service of Certiorari to Inquire into Cause of Detention.

(See page 418.)

Same as form No. 117 to †, and where person upon whom the writ ought to be served keeps himself concealed, or refuses admittance, same as form No. 117, in such case.

No. 120.

Certificate of Service of Alternative Writ of Mandamus.

(See page 431.)

County of , ss.:

I certify that on the day of , 18 , at , I served the within (or annexed) writ on , the person to whom the same is directed, by showing to him the within (or annexed) original writ, and delivering to, and leaving with him, personally a copy thereof.

(Date and Signature.)

(Where the Writ is Directed to a Court, or to the Judge or Judges of a Court.)

County of , ss.:

I certify that on the day of , 18 , at , I served the within (or annexed) writ * on the court of , by showing to and to , members of said court, and constituting a majority of the members thereof, the within (or annexed) original, and delivering to and leaving with each of said persons a copy thereof.

Or, adding after *, “on , judge of the court of (or, on and , judges of the court of); by showing to said judge (or, to each of said judges) the within (or annexed) original writ, and delivering to and leaving with said judge (or, each of said judges) a copy thereof.”

(Date and signature.)

(Where the Writ is Directed to a Board or Body, other than a Corporation.)

County of _____, ss.:

I certify that on the _____ day of _____, 18____, at _____, I served the within (or annexed) writ * on the board of supervisors of the county of _____, by showing to _____, the chairman of said board, the within (or annexed) original writ, and delivering to and leaving with him a copy thereof.

Or, where the board or body is not created by law, having a chairman or other presiding officer, add after *, "on (naming board or body), by showing to _____ and _____, members of said _____, and constituting a majority thereof, the within (or annexed) original writ, and delivering to and leaving with each of said persons a copy thereof."

(Date and signature.)

(Where the Writ is Directed to a Corporation.)

County of _____, ss.:

I certify that on the _____ day of _____, 18____, at _____, I served the within (or annexed) writ, on _____, corporation, by showing the same to _____, secretary (or, such other officer, as the case may be, upon whom service of a summons in the Supreme Court is required to be made, when served on a corporation), and delivering to and leaving with him a copy thereof.

(Date and signature.)

(Where One or More of the Persons to be Served Cannot, After due Diligence, be Found.)

In this case the service is made, as prescribed for the service of a summons in the Supreme Court, in like case; and the certificate of service is the same as in form No. 74.

No. 121.

Certificate of Service of Writ of Prohibition.

(See page 432.)

Same as form No. 119, adding at the end thereof, after the words "a copy thereof," as follows, to wit: "together with a copy of the papers hereto annexed, upon which said writ was granted."

No. 122.

Certificate of Service of Peremptory Writ of Mandamus.

(See page 432.)

This writ is served in the same manner as a summons issued out of the Supreme Court, and for form of certificate of service, see form No. 66, and the forms immediately following same.

No. 123.

Notice of Execution of Writ of Assessment.

(See page 433.)

STATE OF NEW YORK, }
 County of , } ss.:

A writ of assessment having, on the day of , 18 , been issued out of the Supreme Court, directed to me as sheriff of the county of , and commanding me to inquire, by the oaths of twelve men of my county, qualified to act as jurors in a court of record, whether the owner or owners of the real property hereinafter described, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State of New York (or for the use of the United States), and, if so, the amount thereof.

Notice is hereby given, that said writ will be executed on the day of , 18 , at o'clock M., at , in said county.

The said real property is described as follows:

(Here describe real property.)

Dated,

R. H., *Sheriff, etc.*

No. 124.

Oath to Jurors on Writ of Assessment.

(See page 434.)

You and each of you, do swear, that you will diligently inquire as to whether the owner or owners, or any of them, of the real property to be viewed by you, described in the writ of assessment issued out of the Supreme Court, to the sheriff of the county of , on the day of ;

18 , will sustain any damages by the taking thereof, for the use of the people of the State of New York (or of the United States), and, if so, the amount thereof; and that you will give a true verdict, according to the best of your judgment, without favor or partiality, so help you God.

No. 125.

Inquisition upon Writ of Assessment.

(See page 434.)

STATE OF NEW YORK, }
 County of , } ss.:

An inquisition, taken at (naming particular place), in the (town, city or village), of , in the county of , on the day of , 18 , before R. H., sheriff of the county aforesaid, by virtue of a writ of assessment to him directed and delivered, and to this inquisition annexed, upon the oaths of (here name the jurors), jurors duly qualified and summoned and sworn by said sheriff, who, upon their oaths aforesaid, say, that they have viewed the premises in said writ described; * that A. B., the owner of the real property in said writ described, will sustain injury and damages, by reason of the taking thereof, for the use of the people of the State of New York (or United States); and that/such damages amount to the sum of dollars; and we do accordingly find, that the said sum of dollars be paid by the people of the State of New York (or United States) for taking the said real property.

(When More than One Parcel, Owned or Claimed by Different Persons.)

Add after *, "that the real property first described in said writ is owned (or, other interest, as the case may be), by A. B., and is of the value of dollars; that the said A. B. will sustain injury and damages, by reason of the taking thereof, for the use of the people of the State of New York (or United States); and that such damages amount to the sum of dollars; and we accordingly find, that the

said sum of dollars be paid by the people of the State of New York (or United States) for taking the said real property first described in said writ; that the real property, secondly described in said writ, is owned (or state other interest) by C. D., and is of the value of dollars'' (and proceed, as in case of first described parcel, and repeat the same as to each distinct parcel).

In witness whereof, we, the said sheriff, and the said jurors, have hereto set our hands and seals, the day and year first above written.

(Sign and seal by sheriff and each juror.)

NOTE—The value of each parcel need not be assessed, unless the writ so requires, or a majority of the jurors think proper.

No. 126.

Return to Writ of Assessment.

(See page 434.)

County of , ss.:

I certify that upon the receipt by me of the within (or annexed) writ, I caused public notice of the execution thereof to be published, once in each week, for the three successive weeks, immediately preceding the time therein named for the execution of said writ, in the , a newspaper printed and published in the county of , aforesaid—due proof whereof is hereto annexed; that I summoned twelve men of my county, qualified to act as trial jurors in a court of record, to attend at the time and place in said notice named; and that at said time and place I duly administered to each of said jurors the oath required in such case; that the said jurors did thereupon view the real property in said writ described, and thereafter made their inquisition, which is under their hands and seals, as well as under my hand and seal, and is hereto annexed.

(Date and signature.)

No. 127.*Certificate of Service of Certiorari to Review.*

(See page 435.)

(Where Directed to a Person or Persons by Name, or by Official Title, or to a Municipal Corporation, Except it is Directed to a Court, or Judge of a Court, Having a Clerk, or to any other Board or Body, or the Members Thereof.)

Same as in case of a summons in Supreme Court. See form No. 66, and forms following same.

(Where it is to be Served on any other Board or Body, than above, or upon the Members Thereof.)

Same as in case of alternative writ of mandamus. See form No. 120.

(Where on a Court, or to the Judges of a Court, having a Clerk.)

County of _____, ss.:

I certify that on the _____ day of _____, 18____, at _____, I served the writ, of which the annexed (or within) is a copy on (naming court, or judges of court, to whom writ is directed), by filing the same with, viz.: by delivering the same to, and leaving it with, C. D., the clerk of the said ("court," or "judges of the court to whom said writ is directed"), at the office of said clerk, at _____, aforesaid.

(Date and signature.)

No. 128.*Certificate of Service of Precept in Summary Proceedings for Land.*

(See pages 444, 446.)

County of _____, ss.:

I certify that on the _____ day of _____, 18____ (where precept is returnable on same day of its issuance, add, "at _____ hours and _____ minutes, in the _____ noon of said day"), at _____, in said county of _____, I served the within (or annexed) precept on A. B., the person to whom

it is directed (or, if directed to a corporation, on [naming corporation] to which it is directed), by showing him (or, if a corporation, by showing C. D., the secretary [or other officer of corporation, as prescribed in service of summons in Supreme Court, on a corporation] of such corporation), the within (or annexed) original, and at the same time delivering to, and leaving with, him a copy thereof.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

(*Where Directed to More than One Person.*)

County of , ss.:

I certify that at the times and places hereinafter named, I served the within (or annexed) precept, on the following named persons, to whom the same is directed, viz.:

On A. B., at , on the day of , 18 , at
hours and minutes, . M.

On C. D., at , on the day of , 18 , at
hours and minutes, . M.

(Where precept is not returnable on same day it issued, omit the hour and minute of service) by showing to each of said persons the within (or annexed) original, and delivering to, and leaving with, each a copy thereof.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

(*Where Absent from Dwelling-house.*)

County of , ss.:

I certify that on the day of , 18 (where returnable same day, add, "at hours and minutes, . M.), at , in said county of , I served the within (or annexed) precept on A. B., who is a resident of said city (or town),† by delivering to, and leaving with, C. D., a person of suitable age and discretion,* at the dwelling-house of the said A. B., who resides at said dwelling-house, a copy of the within (or annexed) precept, upon which copy there was indorsed a true copy of section 2241 of the Code

of Civil Procedure, and that the said A. B. was then absent from his dwelling-house.

Or, after *, “at the property in said precept described, and in the proceedings thereby instituted sought to be recovered, who resides there (or “who is employed there, no person of suitable age and discretion, after diligent effort, being found, who resides there”), the said A. B., being absent from his dwelling-house, and not being able, after reasonable diligence, to find any person of suitable age and discretion, residing at the dwelling-house of said A. B.; upon which copy there was indorsed a true copy of section 2241 of the Code of Civil Procedure.”

Or, after †, “by affixing a copy thereof, with a true copy of section 2241 of the Code of Civil Procedure thereon indorsed, upon a conspicuous part of the property therein described, and sought to be recovered herein, to wit (here state where copy was affixed): the said A. B. being absent from his dwelling-house, and not being able, with reasonable diligence, to find any person of suitable age and discretion residing at the dwelling-house of said A. B., or residing or employed at the property in said precept described, with which to leave a copy of said precept.”

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 129.

Return on Warrant in Summary Proceedings for Land.

(See page 447.)

I have executed the within (or annexed) warrant, by removing all persons from the premises therein described (and putting C. D. into the full possession thereof.)

(The clause in parenthesis is omitted in case of bawdy houses, or houses of assignation for lewd persons.)

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 130.

Return on Warrant of Attachment for Contempt, Other than Criminal.

(See page 455.)

I have arrested A. B., within named, by virtue of the within warrant,* and have him now in my custody here before , as in said warrant commanded; and, at the time of said arrest, I served upon the said A. B. a copy of the within warrant, and of the affidavit hereto annexed, upon which the said warrant was granted.

(Where from sickness, or other cause, the accused is physically unable to attend before the court or officer, the return is same as above, adding after *, instead of "and have him now in my custody, here, before , as in said warrant commanded," as follows, "but am unable to produce him here now before , as in said warrant commanded, for the reason that the said A. B. is physically unable to attend, being sick [or other cause]," and then continue as above.)

(Date and signature.)

No. 131.

Return on Warrent to Collect Fine.

(See page 460.)

By virtue of the within (or annexed) warrant, I have made of the goods and chattels of A. B., named in the within (or annexed) schedule, the sum of dollars;

I have been unable to find any goods and chattels of C. D., named in the annexed (or within) schedule in my county, out of which to make the sum of dollars, as by the within (or annexed) warrant commanded, and in default thereof I have, by virtue of said warrant, arrested the said C. D., and have him now in my custody in the common jail of the county of .

(Proceed in the same manner as to each person named in the schedule annexed to warrant.)

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

No. 132.*Return on Receipt for Jury in Proceedings for Committee of Idiots, Lunatics and Drunkards.*

(See page 462.)

I have executed the within precept by notifying the following persons to appear at the time and place therein specified, viz.:

(Here give names of persons notified.)

Dated,

R. H., *Sheriff, etc.*
(By, etc., .)

No. 133.*Certificate of Service of Order in Supplementary Proceedings.*

(See pages 463, 466.)

Same as form No. 78.

No. 134.*Return on Warrant in Supplementary Proceedings.*

(See pages 463, 465, 467.)

Same as form No. 130.

No. 135.*Certificate of Service of Citation.*

(See pages 474, 475.)

County of , ss.:

I certify that at the times and places hereinafter named I served the annexed (or within) citation on each of the persons hereinafter named, viz.:

On A. B., at , on the day of , 18 .

On C. D., at , on the day of , 18 .

On E. F., at , on the day of , 18 .

By delivering to, and leaving with, each of said persons a copy thereof.

Or, "by delivering to, and leaving with, each of said persons, excepting the said E. F., a copy thereof; and by leaving a copy thereof at the residence of the said E. F., with the wife of said E. F., she stating to me that she would hand the same to her husband on his return the next day" (or other facts or circumstances, showing good reasons to believe that the copy came to the knowledge of the person cited, in time for him to attend at the return day).

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

(Where service is on an infant under fourteen, a person judicially declared to be incompetent to manage his affairs, or a corporation; or, where, after proper and diligent effort has been made to serve the citation upon a resident of the State, and such person cannot be found, or evades service so that it cannot be made, the service is made in the same manner as is a summons in the Supreme Court. For certificates of service in such cases, see forms Nos. 68, 70, 71, 74, For certificate of inability to serve, see form No. 73.)

No. 136.

Affidavit of Service of Citation and Order in Proceedings to Discover Property withheld from Executor.

(See pages 478, 482.)

County of _____, ss.:

R. H., being duly sworn, says, he is the sheriff of the county of _____; that on the _____ day of _____, 18____, at _____, he served the annexed (or within) citation, together with the order thereon indorsed (or thereto annexed), upon A. B., personally, by showing him the annexed original order and the signature thereto, and delivered to, and leaving with, him a copy of the said citation and of said order, and tendering (or paying) to him the sum of _____ dollars and _____ cents.

Subscribed and sworn to before me, }
 this _____ day of _____, 18____. }

No. 137.*Return of Warrant to Seize Property under Decree in Surrogate's Court.*

(See pages 480, 481.)

County of , ss.:

I certify that I have executed the within (or annexed) warrant by seizing the property in said warrant mentioned, and in the following (or annexed) inventory named, and delivering the same to A. B., the petitioner, as in said warrant commanded.

That such property was taken by me from C. D., in whose possession I found it, and a receipt given to him therefor.

That I found the same in the house occupied by the said C. D., No. 20 Madison street, in , in said county of (or, as the case may be).

Dated,

R. H., *Sheriff. etc.*

(By, etc., .)

Inventory of Property Seized by Virtue of the Annexed (or Foregoing) Warrant.

(Here describe in detail all property seized.)

Or,

County of , ss.:

I certify that I have made search for the property in the annexed (or within) warrant named, and have been unable to find the same, or any part thereof.

Dated.

R. H., *Sheriff, etc.*

(By, etc., .)

No. 138.*Affidavit of Service of Order in Surrogate's Court.*

(See pages 476, 481, 482.)

County of , ss.:

R. H., being duly sworn, says, he is the sheriff of the county of ; that on the day of , 18 , at , he served the annexed (or within) order on A. B. personally. That he so served the same by delivering to,

and leaving with him a copy thereof, and, at the same time, showing to him the annexed (or within) original, and the signature of Hon. _____, surrogate, thereto.

Subscribed and sworn to before me, }
 this day of , 18 . }

R. H.

No. 139.

Subpæna on Investigation of Origin of Fire.

(See page 482.)

Same as form No. 105, *ante*, adding after *, “to testify what you may know in a certain proceeding then and there pending, to investigate the origin of a certain fire at _____, on the _____ day of _____, 18 .

Hereof fail not at your peril.

Given under my hand this _____ day of _____, 18 .

R. H., *Sheriff, etc.*

(By, etc., _____.)

Subpæna Ticket to Accompany Above Subpæna.

Same as form No. 106, *ante*, down to *, adding thereafter, “investigate the origin of a certain fire at _____, on the _____ day of _____ 18 .”

Dated,

• Witness.

R. H., *Sheriff, etc.*

(By, etc., _____.)

No. 140.

Oath to Foreman of Jury, on Inquest to Investigate Origin of Fire, and Oath to Jurors.

(See page 483.)

You do swear that you will well and truly inquire whether the dwellig-house (or, as the case may be) of A. B., situated at _____, and which was, on the _____ day of _____, 18 , destroyed (or injured) by fire (or attempted to be set on fire) was maliciously set on fire (or attempted to be set on fire), and how or in what manner such fire happened (or was attempted), and all the circumstances attending the same, and

who were guilty thereof, either as principal or accessory, and in what manner ; and that you will a true inquest make thereof, according to the evidence offered or arising from a view of the premises ; so help you God.

Oath to Jurors.

The same oath which C. D., the foreman of this inquest, hath taken on his part, you and each of you do now take, and shall well and truly observe and keep on your part ; so help you God.

No. 141.

Oath to Witness on Inquisition as to Fires.

(See page 483.)

The testimony that you shall give upon this inquest, touching the burning (or attempt to burn) the _____, on the _____ day of _____, 18____, shall be the truth, the whole truth, and nothing but the truth; so help you God.

No. 142.

Minutes of Testimony on Inquest as to Fires.

(See pages 483, 484.)

County of _____, ss.:

Testimony of witnesses sworn and examined, this day of _____, 18____, at _____, by R. H., sheriff of the county of _____, before said sheriff and (here name jurors) jurors, summoned and sworn by said sheriff to inquire whether the _____, of A. B., situated at _____, and which was, on the day of _____, 18____, destroyed (or injured) by fire (or attempted to be set on fire), was maliciously set on fire (or attempted to be set on fire), and how, or in what manner, said fire happened (or was attempted), and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner, and to make a

true inquest, according to the evidence offered or arising from a view of the premises.

I. J., being duly sworn and examined, says :

(Signed.)

I. J.

Taken, subscribed and sworn before {
me, this day of , 18 . }

(And so with each witness.)

I certify that the foregoing testimony was reduced (or caused to be reduced) to writing by me, and that the testimony of each witness was read to him before subscribing by him ; and that said testimony is the whole of the testimony given upon such inquest, and is above correctly taken as given by the witnesses respectively.

Dated,

R. H., *Sheriff, etc.*

No. 143.

Inquisition on Investigation as to Fires.

(See page 483.)

STATE OF NEW YORK, {
County of , } ss.:

Inquisition taken before the undersigned, sheriff of the county of , at , in said county, on the day of , 18 , upon the oaths of (here insert names of jurors), duly qualified by law to serve as jurors, and summoned and sworn to inquire whether the (dwelling-house) of A. B., situated at , and which was, on the day of , 18 , destroyed (or injured) by fire (or attempted to be set on fire), and how, or in what manner, said fire happened (or was attempted), and all the circumstances attending the same, and who were guilty thereof either as principal or accessory, and in what manner. After inspecting the place where the fire occurred (or was attempted), and hearing the testimony offered, upon their oaths aforesaid, say, † that the said (dwelling-house) was willfully and maliciously set (or attempted to be set)* on fire by A. B. (here state the circumstances as to such setting on fire, or attempt, giving time, place, method of firing, who, if any assisted, and how, etc.;

and if for getting insurance, state facts in regard to insurance; if other motive state it, if known); that A. B. is guilty thereof as principal, and C. D. and E. F. as accessories.

Witness the hands and seals of said jurors, and the hand and seal of the said sheriff, this day of , 18 .

R. H., *Sheriff*. [L. s.]

G. H., *Foreman*. [L. s.]

I. J., *Juror*. [L. s.]

K. L., *Juror*. [L. s.]

etc., etc.

(*Where the Fire was Incendiary, but the Person or Persons Unknown.*)

Same as above to *, then add, "by some person or persons to the jury unknown," and close as above.

(*Where Circumstances of Fire are not Ascertained.*)

Same as above to †, then add, "that they are unable to ascertain the origin or circumstances of the fire, except that (here state all facts learned)."

Witness, etc., as above.

(*Where the Fire is Accidental.*)

Same as above to †, adding, "that the said fire was occasioned (here state cause of the accidental burning)."

Witness, etc., as in above.

No. 144.

Recognizance of Witnesses, without Surety, upon Inquisition as to Fires.

(See page 483.)

County of , ss.:

On this day of , 18 , before me, R. H., sheriff of the county of , personally appeared, L. M., N. O. and P. Q., and severally acknowledged themselves to be indebted to the people of the State of New York, each in the sum of dollars, to be levied and made of their goods and chattels, lands and tenements, respectively, to the use of the said people. The condition of this recognizance is such that if the said L. M., N. O. and P. Q. be and

appear at the next court of oyer and terminer, to be held in the county of _____, to testify and give evidence in behalf of the people against A. B., for willfully setting fire (or attempting to set fire) to _____, on the _____ day of _____ 18____, before the grand or petit jury, and depart not without leave, then this recognizance to be void; else to remain in full force.

L. M.,
N. O.,
P. Q.

Subscribed and acknowledged the }
day of _____, 18____, before me, }

No. 145.

Recognizance of Witness, with Sureties, upon Inquisition as to Fires.

(See page 483.)

County of _____, ss.:

On this _____ day of _____, 18____, before me, R. H., sheriff of the county of _____, personally appeared R. S. and T. U. and V. W., each of the town of _____, in said county, and the said R. S., as principal, and the said T. U. and V. W., as sureties, each acknowledged himself to be indebted to the people of the State of New York, the said R. S. in the sum of \$500, and the said T. U. and V. W., each, in the sum of \$500, to be levied and made of the goods and chattels, lands and tenements of each, respectively, for the use of the said people. The condition of this obligation is such, that if the said R. S., be and appear, etc., etc. (closing as in form No. 144).

No. 146.

Warrant on Inquisition as to Fire.

(See page 483.)

County of _____, ss.:

*In the name of the People of the State of New York;
to any Peace Officer of the County of _____:*

An inquisition having on the _____ day of _____, 18____, been duly made and executed before me, as sheriff of the

county of _____, upon the oaths of (here name jurors), wherein it is found by said jury that the crime of arson has been committed by the willful and malicious setting fire to _____, on the _____ day of _____, 18____, (or attempting to set fire); and that A. B. is guilty thereof as principal, and C. D. and E. F. as accessories.

You are therefore commanded forthwith to arrest the said A. B., C. D. and E. F., and bring them before me, at _____.

Dated at _____ this _____ day of _____ 18____.

R. H.;

Sheriff of the County of _____.

No. 147.

Appraisal of Wrecked Property.

(See page 484.)

STATE OF NEW YORK, } ss.:
County of _____.

We, the undersigned, selected so to do by the sheriff of the county of _____ (or by _____ one of the coroners of the county of _____), do appraise the following wrecked property, now at _____, in manner following, to wit:

One schooner (name) \$
Tackle (here detail same)
Furniture (describing it).....
Load of (describing).....

And if of various articles in boxes, packages, etc., appraise each article, describing each.

Dated,

A. B., } Appraisers.
C. D., }
R. H., Sheriff, etc.

No. 148.

Notice of Wrecks.

(See pages 484, 485.)

To all parties interested: Take notice, that I have this day taken possession of (here insert a minute description

of the wrecked property ; if a vessel, give a description of same, and name ; and describe the property, either in or out of a vessel ; describe each and every bale, bag, box, cask, piece or parcel, and give the marks, brands, letters and figures on each) ; that such wrecked property is now at ; that the condition of such wrecked property is as follows (here describe the actual condition, *e. g.*, “that the wheat with which said vessel is loaded is wet, and beginning to heat”) ;

That the name of the vessel from which such property was taken (or cast on shore) is (here state name, if known ; if not known, state that fact) ; that the name of the master of such vessel is (here state name ; or, if unknown, state that fact), and of the super-cargo is (here state name ; or, if unknown, state that fact).

(If possessed of vessel) that said vessel is now at , and is (here state condition of vessel).

Dated,

R. H.,

Sheriff of the County of .

(Or, R. C., coroner of the county of .)

No. 149.

Petition, etc., for Sale, where Wrecked Property is Perishable.

(See page 485.)

To Hon. , County Judge of county :

Your petitioner respectfully shows ; that he has this day, as sheriff (or one of the coroners) of the county of , taken possession of (here describe property ; if including vessel, give name of same) ; that an appraisal thereof has been duly made, a copy of which is hereto annexed ; that such property is in the following condition, to wit (here describe condition of property, showing reason why sale should be had.)

Your petitioner, therefore, prays that an order may be made, authorizing a sale of such property, pursuant to the statute in such case made and provided.

R. H., *Sheriff, etc.*

(Or, R. C., coroner, etc.)

County of , *ss.:*

R. H., being duly sworn, says that he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the facts therein stated are true to his own knowledge; that the matters therein stated to be upon his information and belief, he believes to be true.

R. H.

Subscribed and sworn to before me, {
this day of , 18 . }

No. 150.

Notice of Sale of Wrecked Property.

(See pages 485, 488.)

Sale of Wrecked Property.

Notice is hereby given that I will sell the wrecked property hereinafter described, at public auction, at , on the day of , 18 , at o'clock . M., to wit (here give a particular description of the property to be sold.)

R. H., *Sheriff, etc.*
(Or, coroner, etc.)

No. 151.

Return on Warrant Against Ship or Vessel.

(See page 494.)

I have seized and now have, in my custody, under the within (or annexed) warrant, the vessel therein named, her tackle, apparel and furniture, to wit (here give an inventory of same): I have received no other warrant against said vessel (or I have also seized the same under the following warrant [or warrants]), to wit, a warrant issued in behalf of , for the sum of dollars, received by me on the day of , 18 , at o'clock . M. (and the same as to each other warrant, if more than one).

Dated,

R. H., *Sheriff, etc.*

No. 152.*Return on Order for Sale of Vessel.*

(See page 496.)

County of , ss.:

I do hereby certify and return, that by virtue of the within (or annexed) order, I sold the vessel therein named, her tackle apparel and furniture, at public auction, on the day of , 18 , at ; having first given due notice of such sale pursuant to statute; and that upon such sale said property was struck down to , for the sum of dollars, that being the highest sum bid therefor, and he being the highest bidder; that the proceeds of said sale are now in my hands.

Dated,

R. H., Sheriff, etc.

No. 153.*Notice of Sale of Distrained Property.*

(See page 499.)

Notice of Sale of Property Distrained.

The following property having been distrained doing damage, I shall, by virtue thereof, sell the same, at public auction, on the day of , 18 , at o'clock, . M., at , pursuant to the statute.

Dated,

R. H., Sheriff, etc.

(By, etc., .)

(Or, J. P., constable of the town of .)

No. 154.*Return on Sale of Property Distrained.*

(See page 499.)

County of , ss.:

I certify that by virtue of the proceedings appearing by the annexed affidavit , whereby the property mentioned in the annexed certificate of appraisers was distrained pursuant to the statute in such case made and provided, which affidavit and certificate were delivered to me, I did,

pursuant to statute, sell said property, at public auction, on the day of , 18 , at , having first given notice of such sale as required by law ; that upon such sale the said property was struck off to , for the sum of dollars, that being the highest sum bid therefor, and he being the highest bidder ; that out of the proceeds of such sale I have retained the sum of dollars for my fees ; I have paid to the said the sum of dollars, the amount of the damages certified in the annexed certificate of the appraisers, together with the sum of dollars, for expenses, as certified by , county judge of county (or justice of the peace of the county of ;) that the balance of said proceeds has been paid by me to , county treasurer of the county of , whose receipt therefor, together with the receipt of the said , are hereto annexed.

Dated,

R. H., *Sheriff, etc.*

(By, etc., .)

(Or, J. P., constable, etc.)

No. 155.

Affidavit of Service of Precept for Jury, under Act to Incorporate Plank-road, etc., Companies.

(See page 500.)

County of , ss.:

R. H., being duly sworn, says, he is the sheriff (or deputy sheriff, or constable), to whom the annexed precept is directed ; that he served the same upon each of the following named persons, as follows, viz.:

On A. B., at , on the day of , 18 .

On C. D., at , on the day of , 18 .

By delivering to, and leaving with, each of said persons, a notice containing the substance of such precept.

On E. F., at , on the day of , 18 .

On G. H., at , on the day of , 18 .

By leaving at the residence of each of said persons a notice containing the substance of such precept.

That the distance necessarily traveled by me in making such service was miles.

R. H.

Subscribed and sworn to before me, }
 this day of , 18 . }

No. 156^a

Notice of Sale of Real Property under Decree.

(See pages 501, 502.)

(Title of cause.)

By virtue of a judgment of foreclosure and sale (or of partition and sale, or as the case may be), made in the above entitled action, on the day of , 18 , the subscriber, as sheriff of the county of , will sell, at public auction, at , on the day of , 18 , at o'clock in the noon of that day, the real estate in said judgment described as follows: (Here insert description of property to be sold.)

Dated,

R. H., *Sheriff, etc.*

(In case of postponement, add to above: "The above sale is postponed to the day of , 18 , at the same hour and place.")

Dated,

R. H., *Sheriff, etc.*

No. 157.

Memorandum of Sale of Real Property under Decree.

(See page 503.)

(Annex printed notice of sale.)

The premises described in the annexed notice of sale will be sold upon the following terms and conditions, to wit: (Here state terms and conditions of sale; *e. g.*)

1. Ten per cent of the purchase money will be required to be paid down upon the sale, and the balance will be required to be paid upon delivery of the deed (or, on the day of , 18 , when a deed for the premises sold will be delivered).

2. The premises will be sold in parcels, as follows, etc.:

3. Each purchaser will be required to sign a memorandum of his purchase, stating the terms and conditions, upon the same being struck down.

(To be Added at Foot of Above, and Signed by Purchaser.)

I have this day purchased the premises first described in the annexed printed notice of sale, for the sum of dollars, upon the terms and conditions above stated, and agree to pay the said sum therefor as per said terms and conditions.

Dated,

(Signed.)

I have this day purchased the premises secondly described in the annexed printed notice of sale, etc.

Dated,

(Signed.)

No. 158.

Sheriff's Deed on Sale in Partition.

(See page 503.)

This indenture, made this day of , in the year of our Lord one thousand eight hundred and eighty , between R. H., sheriff of the county of , of the first part, and of the second part.

Whereas, at a special term of the Supreme Court of the State of New York, held at , on the day of , one thousand eight hundred and eighty , it was, among other things, ordered, adjudged and decreed by the said court, in a certain action then pending in the said court, between , plaintiff, and , defendant; that all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the rules and practice of said court (by or under the direction of the sheriff of county); that public notice of the time and place of such sale, be given according to law and the rules and practice of said court, and that any of the parties in said action might become a purchaser or purchaser on such sale; that after said sale a re-

port thereof be made (by said sheriff), and after such report shall have been duly confirmed, then that a good and sufficient deed or deeds of conveyance for the same be executed (by him) to the purchaser or purchasers.

And whereas, the said sheriff, in pursuance of the order and judgment of the said court, did, on the day of 18 , sell at public auction, at , the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said party of the second part, for the sum of dollars, that being the highest sum bidden for the same; and the said sale having been duly confirmed upon a report thereof, by an order bearing date the day of , 18 .

Now this indenture witnesseth, that the said sheriff, the party of the first to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order, and judgment of said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part.

(Where the judgment specifies the particular party or parties, whose right, title or interest is directed to be sold, here insert as follows: "All the right, title and interest of A. B., C. D. [naming the particular party or parties whose right or interest is so directed to be sold, *without naming any of the other parties* to the action] in and to.")

All (here insert description of premises sold).

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof, forever.

In witness whereof, the said party of the first part, sher-

iff as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

R. H., [L. S.]

Sheriff of the County of .

Sealed and delivered in }
presence of . }

STATE OF NEW YORK, }
County of , } ss.: .

On this day of , 18 , before me, the subscriber, personally appeared R. H., sheriff of the county of , to me known to be the same person described in and who executed the foregoing conveyance, and acknowledged that he executed the same.

No. 159.

Sheriff's Deed on Sale in Mortgage Case.

(See page 503.)

This indenture, made this day of , in the year of our Lord one thousand eight hundred and eighty , between R. H., sheriff of the county of , of the first part, and , of , of the second part;

Whereas, at a special term of the Supreme Court of the State of New York, held at , on the day of , one thousand eight hundred and eighty , it was among other things, ordered, adjudged and decreed, by the said court, in a certain action then pending in the said court, between , plaintiff, and , defendant,* that all and singular the premises described in a certain mortgage executed by to , and recorded in county clerk's office, in liber , at page , and being the same premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction according to the course and practice of said court (by or under the direction of the sheriff of county);† that the said sale be made in the

county where the said mortgaged premises, or the greater part thereof, are situated; that public notice of the time and place of such sale, be given according to law and the rules and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that a good and sufficient deed or deeds of conveyance for the same be executed (by said sheriff) to the purchaser or purchasers of said premises, or such part or parts thereof, as shall be sold; and,

Whereas, the said sheriff, in pursuance of the order and judgment of the said court, did, on the day of , 18 , sell at public auction at , the premises in said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said party of the second part, for the sum of dollars, that being the highest sum bidden for the same;

Now, this indenture witnesseth.

(Close as in form No. 157.)

No. 160.

General Form of Sheriff's Deed of Real Estate Under a Decree.

(See page 503.)

Same as in form No. 158 down to *, then recite provisions of the decree applicable; *e. g.*, "that all and singular the premises described in the complaint in said action, and hereinafter described, be sold at public auction, etc."

(Close as in form No. 158 from †, leaving out the word "mortgaged.")

No. 161.

Report of Sale Under Decree.

(See pages 503, 504.)

(*In Partition.*)

(Title of action.)

To the Supreme Court of the State of New York:

In pursuance of the decree entered herein, on the

day of , 18 , I, R. H., sheriff of the county of , respectfully report that I gave due notice of the time and place of said sale, by causing a notice thereof to be published once in each week for six weeks successively, next preceding the day of sale therein mentioned, in , a public newspaper printed in said county; and also by fastening up in three public places in the town where the said premises are situated, and were advertised to be sold, six weeks next preceding the day of such sale, copies of the said printed notice; proof of which publication and posting, together with a copy of such notice, is hereto annexed, and forms a part of this my report; that at the time and place mentioned in said notice, I exposed the said premises for sale at public auction, and the same were then and there struck off to for the sum of dollars, that being the highest sum bidden therefor, and he being the highest bidder; and that the said has signed a written memorandum, stating the terms and conditions of said sale, which is hereto annexed, and forms a part of this my report, and correctly shows said terms and conditions; that I have received from the said the sum of dollars, pursuant to said terms of sale.*

All of which is respectfully submitted.

Dated,

R. H.,

Sheriff of the County of .

STATE OF NEW YORK, }
County of , } ss.:

R. H., being duly sworn, says, that the foregoing report by him subscribed is true.

R. H.

Subscribed and sworn to before me, }
this day of 18 . }

(Final Report in Partition.)

To the Supreme Court of the State of New York:

In pursuance of the decree entered herein on the day of , 18 , and of the order confirming my report of sale thereunder, bearing date the day of 18 , entered herein on the day of , 18 , I R. H., sheriff of the county of , respectfully report: *

(Add verification as above.)

Same as above (*In Partition*) and (*Final Report in Partition*), if a report of sale is required by decree before deed ; and same as above (*In Foreclosure*), if report of sale is made after deed.

(Same as form No. 37.)

R. H., *Sheriff, etc.*

No. 164.*Return on Warrant for Fines Under Military Code.*

(See page 510.)

(Same as form No. 131.)

No. 165.*Return on Warrant for Removal from Indian Lands.*

(See page 514.)

County of , ss.:

I certify that pursuant to the commands of the within (or annexed) warrant, I have removed A. B. from the lands in said warrant mentioned.

Dated,

R. H., Sheriff, etc.

(On Warrant for Commitment on a Re-entry.)

County of , ss.:

I certify that I have executed the within (or annexed) warrant by arresting A. B. and committing him to the jail of the county of .

Dated,

R. H., Sheriff, etc.

No 166.*Certificate of Service of Comptroller's Notification.*

(See page 515.)

County of , ss.:

I certify that on the day of , 18 , at , I served the within notification upon A. B., within named, by delivering to, and leaving with, him a copy thereof (or "by leaving a copy thereof at the usual place of abode of the said A. B.")

That the said A. B., resides at , in the county of .

Dated,

R. H., Sheriff, etc.

No. 167.*Return on County Treasurer's Warrant for Taxes.*

(See page 516.)

Same as form No. 114. Substituting the word "*warrant*" for "*execution*."

No. 168.*Return on Treasurer's Warrant for Tax on Debt Owiny Non-Resident.*

(See pages 517, 518.)

Same as form No. 114, substituting the word "*warrant*" for "*execution*," and where schedule annexed contains names of more than one, making separate return as to each person, naming each.

No. 169.*Return on Warrant for Taxes Against Persons Removed from County.*

(See page 518.)

Same as form No. 114, substituting the word "*warrant*" for "*execution*" and omitting the words "*lands and tenements*."

No. 170.*Return on County Treasurer's Warrant Against Collector.*

(See page 520.)

County of , ss.:

I certify that I have made the whole amount directed to be made by the within warrant, together with my fees.

Or, "I certify that I have made the sum of dollars upon the within warrant, exclusive of my fees, and that the said collector has no goods and chattels, lands and tenements, within my county, from which to make the residue of the sum mentioned in the within warrant."

Or, "I certify that the within named collector has no goods.

and chattels, lands and tenements, within my county, out of which to make the within named sum, or any part thereof."

Dated,

R. H., *Sheriff, etc.*

No. 171.

Return on Warrant to Obtain Possession of Canal Property.

(See pages 521, 522.)

County of _____, ss.:

I certify that I have executed the within warrant by removing from the premises, therein named, all persons found in possession thereof, and taking into my custody the books, papers, and other things named in the inventory hereto annexed, and delivering the same to _____, canal commissioner (or to _____, agent of _____, canal commissioner).

Dated,

R. H., *Sheriff, etc.*
(Or, constable, etc.)

No. 172.

Bond for Jail Liberties.

(See pages 544, 545.)

Know all men by these presents: That we (here name prisoner), and A. B., of _____, merchant, and C. D., of _____, merchant, are held and firmly bound unto R. H., sheriff of the county of _____, in the sum of _____ dollars, to be paid to the said R. H., or to his certain attorney, executor's, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the _____ day of _____, in the year one thousand eight hundred and eighty _____.

Whereas, the above bounden _____, is now in the custody of the said R. H., sheriff of the county of _____, by virtue of (here recite process under which he is held; *e. g.*, "by

virtue of an execution issued out of the Supreme Court of this State, in an action in which R. D. is plaintiff and the said is defendant, against the said for dollars damages and costs, which execution bears date the day of 18 , and was received by said sheriff on the day of , 18 .”)

Now, therefore, the condition of this obligation is such, that if the said shall remain a prisoner in the custody of the said sheriff, and shall not, at any time, or in any manner, escape or go without the liberties of the jail of the county of , as duly established, until discharged by due course of law, then this obligation to be void, else to remain in full force.

A. B. [L. s.]

C. D. [L. s.]

Sealed and delivered in }
the presence of }

STATE OF NEW YORK, }
County of , } ss.:

On this day of , 18 , before me personally appeared , A. B. and C. D., to me known to be the same persons named in and who executed the foregoing instrument, and severally acknowledged the execution thereof.

STATE OF NEW YORK, }
County of . } ss.:

A. B. and C. D., being severally duly sworn, say, and each for himself says, that he is a freeholder (or householder) and resident of the county of , and is worth the sum of dollars, over and above all his debts and liabilities, and exclusive of his property exempt from levy and sale by execution.

A. B.

C. D.

Severally subscribed and sworn to before }
me, this day of , 18 . }

No. 173.*Acknowledgment of Surrender of Defendant by Bail, on Bond for Jail Liberties.*

(See page 545.)

I hereby acknowledge the surrender of the within named,
 , defendant, to me, this day of , 18 , by
 A. B. and C. D., his sureties in the within bond, by the de-
 livery to me of the said , defendant.

R. H., *Sheriff, etc.***No. 174.***Certificate of Surrender of Defendant by his Bail.*

(See page 545.)

(Title of cause.)

County of , *ss.:*

I hereby certify that , the surety (or sureties), in the
 undertaking, given by , defendant, upon his discharge
 from my custody, on the day of , 18 , has (or
 have) this day of , 18 , surrendered the said
 , defendant, by delivering him into my custody.

R. H., *Sheriff, etc.***No. 175.***Assignment of Bond for Jail Liberties.*

(See page 547.)

Know all men by these presents: That I, R. H., sheriff
 of the county of , do hereby assign and set over, pur-
 suant to the statute in such case made and provided, the
 within bond, to E. F., the plaintiff therein named.

R. H., *Sheriff, etc.* [L. S.]

Signed, sealed and delivered }
 in the presence of }

(Add acknowledgment.)

No. 176.

Report to Supervisors of Moneys Received.

To the Board of Supervisors of the County of :

I, the undersigned, as sheriff of said county, respectfully report, pursuant to chapter 404 of the Laws of 1863, that the following is a true statement and account of all the moneys received by me as such sheriff, on account of any fine, penalty or other matter in which said county has an interest, with the time when, and the persons from whom, the same was received, and on what account, from and including the first day of November, 18 , to date.

And I further report, that all of said moneys were by me duly paid over to the treasurer of said county, whose receipts therefor are hereto annexed.

Received.

18 . Nov. 2.	Received of A. B., on account of fine for (here state particulars)	\$25 00
Dec. 3.	Received of C. D., on etc.....	10 00
		<hr/> \$35 00

Paid.

18 . Nov. 2.	Paid to County Treasurer.....	\$25 00
Dec. 3.	Paid to County Treasurer.....	10 00
		<hr/> \$35 00

Dated, *November 1*, 18 . .

R. H., *Sheriff, etc.*

County of , ss.:

R. H., being duly sworn, says, that the foregoing report, by him subscribed, contains a correct statement and account of all moneys by him received as sheriff of said county, on account of any fine or penalty, or any matter in which said county is interested, from and including this first day of November, 18 , to and including the date thereof.

R. H.

Subscribed and sworn to before me, }
this day of 18 . }

FORMS FOR CORONER.

No. 177.

Oath.

(See page 606.)

See form No. 1, *ante*.

NOTE —For forms generally, where coroner acts as sheriff “*forms for sheriff*” may be used, substituting “coroner” for “sheriff.”

No. 178.

Resignation.

(See page 607.)

Same as form No. 7, *ante*, substituting “coroner” for “sheriff.”

No. 179.

Designation of Coroner to Execute office of Sheriff.

(See page 610.)

To all whom it may concern, know ye: That whereas, a vacancy has occurred in the office of sheriff of the county of _____, and there is no under-sheriff of such county now in office (or, “and the office of under-sheriff has also become vacant,” or, “and the under-sheriff has become incapable of executing said office”); and,

Whereas, there is now more than one coroner of said county in office;

Now, therefore, I, _____, county judge of said county, do hereby, pursuant to the statute in such case made and provided, designate R. C., one of the coroners of said county, to execute the office of sheriff of the said county of _____, until a sheriff thereof shall be elected or appointed, and qualified.

Dated at _____, this _____ day of _____, 18 ____.

County Judge of _____ County.

No. 180.

Bond, When Designated as Sheriff.

(See page 610.)

Same as form No. 2, *ante*, substituting a recital of the designation of coroner to act as sheriff, instead of the election or appointment of sheriff, and substituting "coroner" for "sheriff."

No. 181.

Bond of Sole Coroner, Acting as Sheriff.

(See page 611.)

Same as last, reciting the vacancy of office of sheriff and of under-sheriff, and the fact that he is sole coroner, instead of the designation to act as sheriff.

No. 182.

Oath to Jury, Witness, and Interpreter.

(See pages 623, 627.)

(To Foreman of Jury.)

You do swear that you will well and truly inquire who the person whose body you have just viewed was, and when, where and by what means he came to his death (or was wounded), and into the circumstances attending the death (or wounding), and render a true verdict thereon, according to the evidence offered to you, or arising from the inspection of the body: so help you God.

(*To Jurors.*)

The same oath which C. D., the foreman of this inquest, hath taken on his part, you and each of you do now take, and shall well and truly observe on your part: so help you God.

(*To Witness.*)

The evidence you shall give upon this inquest touching the death (or wounding) of (or, "of the person whose body has been viewed"), shall be the truth, the whole truth, and nothing but the truth: so help you God.

(*To Interpreter.*)

You shall truly interpret to , the witness, the oath administered to him upon this inquest; and shall also truly interpret between the coroner, the jury (the counsel), and the witness: so help you God.

No. 183.

Subpæna.

(See page 625.)

In the Name of the People of the State of New York:

To :

You, and each of you, are hereby commanded, that all business and excuses being laid aside, you be and appear before the undersigned, one of the coroners of the county of , at , on the day of next, at o'clock, . M. (or forthwith), then and there to testify on an inquest upon the body of (or, "upon the body of a person whose name is not now known"); and hereof fail not at your peril.

Witness the hand of said coroner, this day of ,
18 . , Coroner.

Attachment Against Witness.

*The People of the State of New York, to the Sheriff of the
County of _____, Greeting:*

Witness the hand of the said coroner, this day of
 , 18 .

, *Coroner.*

Examination of Witnesses.

County of _____, ss.:

L. M., being duly sworn, says (here give testimony in full).

R. H.

Taken, subscribed and sworn to before }
me, this day of , 18 }

R. C., *Coroner.*

County of _____, ss.:

I certify that the foregoing testimony was taken by me (or under my direction); that the testimony of each wit-

ness, as it appears above, is all the testimony of such witness, and that the foregoing is all the testimony taken upon such inquest; that such testimony is correctly taken, and that the testimony of each witness was read to him by me before subscribing.

R. C., *Coroner.*

No. 186.

Inquisition.

(See pages 624, 630.)

STATE OF NEW YORK, }
County of } ss.:

Inquisition taken at , on the day of , 18 , before R. C., one of the coroners of said county, upon the body of (or a person unknown), then and there lying dead (or wounded), upon the oath of (here name jurors) good and lawful men of said county, who, being summoned by said coroner, and by him duly sworn to well and truly inquire who the person whose body we had viewed was, and when and by what means he came to his death (or was wounded), and into all the circumstances attending the death (or wounding), do say upon their oaths, that the person whose body we have viewed was , that he came to his death (or was wounded) on the day of 18 , at , that (here set out particularly the facts and circumstances found).

Examples.

("The said , came to his death from a wound inflicted by a ball fired from a pistol in the hands of one I. Q., which ball entered the brain of the said , deceased, and was the immediate cause of his death; that the said wound was inflicted by the said I. Q., with the premeditated design of causing the death of the said .")

Or, ("the said came to his death from , a disease with which he was afflicted, and that said death occurred from natural causes, and not otherwise.")

Or, ("that the said came to his death from a wound inflicted upon his throat with a razor, and that said wound was inflicted by the said himself, he then being a person of unsound mind.")

Or, ("that the said came to his death from drowning, having accidentally fallen into the Hudson river while fishing.")

Or, ("that the said was found, etc.; but that the cause of his death is unknown; and from an examination of the body, and the testimony, the said jury are not able to find the cause thereof.")

In witness whereof, as well the said coroner as the jurors aforesaid, have hereunto set their hands and seals this day of , 18 .

R. C., *Coroner.* [L. S.]

G. H., *Foreman.* [L. S.]

I. J., *Juror.* [L. S.]

(Each juror signing and sealing.)

No. 187.

Warrant.

(See pages 630, 631.)

County of , ss.:

*In the Name of the People of the State of New York:
To any peace officer in this State:*

An inquisition having been this day found by a coroner's jury, before me, stating that ("A. B. has come to his death by the act of C. D. by criminal means," or, as the case may be, as found by the inquisition).

You are, therefore, commanded forthwith to arrest the above named C. D., and take him before the nearest and most accessible magistrate in this county.

Dated at , the day of , 18 .

R. C.,

Coroner of the County of .

No. 188.

Statement to Supervisor's as to Property.

(See page 632.)

To the Board of Supervisors of the County of :

The undersigned, one of the coroners of the county of

, in compliance with section 788 of the Code of Criminal Procedure,* herewith submits the following statement of all moneys, or other property, found upon persons on whom inquests have been held by him, and the disposition thereof, for and during the year commencing on and including the day of , 18 , to and including the date of this statement, to wit :

NAME OF DECEASED.	Property found.	How disposed of.
John Doe.....	One silver watch and steel chain ; \$2.50 in money	Delivered to county treasurer.
Richard Roe	\$100 in money	Delivered to C. D., administrator of estate of deceased.

Dated,

R. C., *Coroner, etc.*

County of , ss.:

R. C., being duly sworn, says, that the foregoing statement is true, and that the moneys and property therein mentioned have been delivered, as therein stated, to the legal representatives of the deceased, or to the county treasurer.

R. C.

Subscribed and sworn to before me, {
this day of , 18 . }

(In Case no Moneys or Property have been Found.)

Same as above to *, then add, "respectfully reports, that for and during the year commencing on the day of , 18 , to and including this date, no moneys or other property have been found upon persons on whom inquests have been held by him.

Dated,

R. C., *Coroner, etc.*

County of , ss.:

R. C., being duly sworn, says, that the foregoing statement by him subscribed is true.

R. C.

Subscribed and sworn to before me, {
this day of , 18 . }

No. 189.

Report to Supervisors, as to Service of Jurors.

(See page 625.)

To the Board of Supervisors of the County of :

The undersigned, one of the coroners of the county of , pursuant to chapter 286 of the Laws of 1878, submits the following report of the names of jurors summoned by him and serving upon coroners inquests, with the term of service of each, and upon what inquest rendered, during the year commencing on and inclusive of the day of , 18 , and ending on and inclusive of the day of the date hereof, to wit:

NAMES OF JURORS	Term of service.	On what inquest.
J. D.....	1 day	Body of T. D.
	1 day	Body of S. T.
C. R.....	1 day	Body of T. D.
	1 day	Body of S. T.
	1 day	Body of R. L.

Dated at this day of , 18 .
R. C., Coroner, etc.

No. 190.

Account Against County.

(See page 636.)

The County of to R. C., one of the Coroners of said County:

DR.

To fees and expenses on inquest upon the body of A. B., held at , on the day of , 18 , as follows, viz.:

Mileage to place of inquest and return, five miles, one way	\$1 00
Summoning and attendance upon jury	3 00
Viewing body	5 00
Serving subpoena, 20 miles traveled	2 00
Swearing five witnesses	65
One additional day taking inquisition	3 00
Drawing inquisition	1 00
Copying inquisition for record, 75 folios	18 75
Making and transmitting statement to board of su- pervisors, as to property found	50
Issuing warrant for arrest of C. D., charged by the verdict of the jury with a crime	25
Paid R. S. for use of room, in which to dissect body	2 50
Paid L. M., carrying body from place where found to place where dissection was had, two miles....	1 00
Paid Prof. R. L., for examination of stomach, there being indications of death from poisoning	25 00
Paid for sponges used on dissection	75
Paid for ice used on body	50
	<hr/>
	\$64 90
	<hr/>

County of , ss.:

R. C., being duly sworn, says that the items of the above account are correct; that the disbursements and services charged therein have, in fact, been made or rendered, and that no part thereof has been paid; that the disbursements therein charged were necessarily actually paid out by him in the discharge of his official duties as and for the purposes therein stated; that in the case of A. B., therein, the body was found at , and no nearer place suitable for the dissection could be obtained than the house of R. S.; that in the said case the testimony pointed towards the poisoning of deceased, and no satisfactory evidence thereof could be procured without a chemical analysis of the stomach, and no competent expert nearer than the city of could be procured to make such analysis, etc.

R. C.

Subscribed and sworn to before me, }
this day of , 18 . }

FORMS FOR CONSTABLES.

No. 191.

Appointment in Towns where Elected at Town Meeting.

(In case of Neglect to Choose such Officers, or any of them, at any Town Meeting.)

(See pages 642, 643.)

TOWN OF _____ , } ss.:
County of _____ , }

Whereas, the said town of _____ , having, at its last annual town meeting, failed to elect the full number of constables authorized by law, and having elected but four (or none), being entitled to five, whereby a vacancy (or vacancies) in said office has (or have) occurred,* we, the undersigned, three justices of the peace of said town, do hereby, pursuant to the statute in such case made and provided, appoint A. B. (or A. B., C. D., E. F., G. H. and I. J.), of said town, to fill such vacancy (or vacancies) until another person (or other persons) is (or are) elected or appointed in his (or their) place.

Witness our hands and seals this _____ day of _____ , 18 ____ .

C. D.	[L. S.]	} Justices of the	
E. F.	[L. S.]		Peace of the
L. S.	[L. S.]		Town of _____ .

(In Case of Vacancy Occurring by Refusal to Serve, Death, Resignation, Removal from Town, or Removal from Office.)

(See pages 645, 646.)

TOWN OF _____ , } ss.:
County of _____ , }

Whereas, a vacancy has occurred in the office of constable of said town of _____ , by the refusal of A. B., elected to

such office at the last annual town meeting, to serve (or other cause, as the case may be).

(Conclude as in above from *.)

(*Where there are not three Justices in the Town.*)

(See page 646.)

Same as above to *, adding, "we, the undersigned, C. D. and E. F., being the only justices of the peace in said town, having associated with us G. H., a justice of the peace of the adjoining town of; and we, the said three justices, undersigned, etc. (closing as above).

No. 192.

Appointment in Towns where Elected at General Election.

(*In case of Neglect to Choose such Officers, or any of them, at General Election.*)

(See pages 642, 643.)

Same as first form of No. 190 to *, substituting, "*at the last general election held therein,*" in place of, "*at its last annual town meeting,*" and adding after *, "we, the undersigned, the supervisor and justices of the peace (or, "a majority of the supervisor and justices of the peace") in said town, etc. (closing as in No. 190).

[*In case of Vacancy Occurring by Refusal to Serve, Death, etc.*]

(See pages 645, 646.)

Same as last form in No. 190 as far as given, substituting "*at the last general election*" in the place of "*at the last annual town meeting,*" closing as next above.

No. 193.

Resignation.

(See page 645.)

[*Where Elected at Town Meeting.*]

To C. D, E. F. and G. H., Justices of the Peace of the town of :

I hereby tender my resignation of the office of constable

of said town, for the reason that my health will not permit the discharging the duties thereof (or other reason).

Dated,

A. B.

[*Where Elected at General Election.*]

To I. J., Supervisor, and C. D., E. F. and G. H., Justices
of the Peace of the Town of .

(Then proceed as in above.)

No. 194.

Oath.

(See page 647.)

(See form No. 1, *ante.*)

No. 195.

Bond.

(See pages 647, 648.)

We, A. B., elected (or appointed) constable of the town of , in the county of , and G. D., and E. F., of, etc., as his sureties, do hereby, jointly and severally, promise and agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for execution; and also to pay each and every such person for any damages which he may sustain from or by any act or thing, done by the said A. B., by virtue of his office of constable.

Witness our hands and seals this day of , 18 .

A. B. [L. s.]

C. D. [L. s.]

E. F. [L. s.]

Executed in the presence of G. H., supervisor (or, I. J., town clerk).

(*Approval of Above to be Indorsed.*)

I approve of the sufficiency of the sureties within named.

Dated,

G. H., *Supervisor.*

(Or, I. J., town clerk.)

No. 196.

Bond Under Military Code.

(See page 649.)

Same as form No. 6, *ante*, substituting "constable" for "sheriff."

(*The penalty of this bond is such sum as may be approved by the county judge.*)

No. 197.

Certificate and Requisition for Sheriff to Execute Mandate.

(See page 650.)

TOWN OF , } ss.:
County of , }

I, the undersigned constable of the town of , in the county of , having reason to apprehend that resistance will be made to the execution of the annexed mandate issued by , justice of the peace, and to me delivered for execution, do hereby deliver the same to you as sheriff of said county, for execution, pursuant to the provisions of section 3158 of the Code of Civil Procedure, and require you to execute the same.

The following are the facts, giving me reason to apprehend resistance as aforesaid (here set out the facts in full.)

Dated,

A. B., *Constable.*

No. 198.

Return of Service of Summons and Complaint.

(See pages 656, 659.)

Personally served the day of , 18 , by delivering to and leaving with A. B., the defendant (or "by delivering to and leaving with A. B. and C. D., defendants, each"), true copies of the within summons and complaint.

Fees.

H. B., *Constable.*

No. 199.

Return on Service of Summons.

(See pages 657, 660.)

(Where Personally Served.)

Personally served the day of , 18 , by delivering to and leaving with A. B., defendant, a copy thereof.
Fees.

H. B., *Constable.*

Or, Personally served the day of , 18 , on A. B. and C. D., defendants, by delivering to, and leaving with, each of them a copy thereof.

Or, Personally served the day of , 18 , on A. B., defendant, and the day of 18 , on C. D., defendant, by delivering to, and leaving with, each a copy thereof.

No. 200.

Return on Service of Summons upon Corporation or Association.

(See pages 657, 659.)

Personally served the day of , 18 , by delivering to, and leaving with A. B. (president, director, trustee, or, as the case may be), of the defendant, corporation, a copy thereof.

(Where Corporation, or Association, has Designated a Person on whom Service may be Made.)

Personally served by delivering to, and leaving with (naming person designated), a copy thereof.

(Signature.)

Fees.

No. 201.

Return on Summons that Defendant, or Person Designated, cannot be Found, etc.

(See pages 657, 658, 660.)

The defendant (or person designated, naming him) cannot, after due diligence, be found in the county of .

Or, C. D. (person designated), is dead (or has ceased to reside in the county of).

Or, A. B., the defendant, cannot, after due diligence, be served for the reason (stating why).

Or, The defendant, A. B., cannot, after due diligence, be found in the county of , and his last place of residence cannot be ascertained.

R. G., *Constable*.

Fees.

No. 202.

Return on Order of Arrest.

(See page 662.)

I have arrested the defendant, A. B., and have him here before the court; and I have notified the plaintiff thereof (or, "have not notified the plaintiff for the reason that I could not do so, with reasonable diligence").

Or, I have not been able to find the defendant, A. B., within the county of .

Or, I have arrested the defendant, A. B., and have him here, etc., but have not been able to find the defendant, C. D., in the county of ; and I have notified the plaintiff of the arrest of the said A. B.

Dated,

(Signature.)

No. 203.

Inventory of Property Attached.

(See page 666)

Inventory of property attached under the within (annexed or foregoing) attachment, to wit:

1 black mare, estimated value.....	\$25 00
1 buggy, " "	50 00

\$75 00

Dated,

(Signature.)

No. 204.

Return on Attachment.

(See page 667.)

By virtue of the within (annexed or foregoing) attachment, I did, on the day of , 18 , seize and take possession of the property in the inventory, a copy of which, certified by me, is hereto annexed, mentioned, at , in the county of ; that thereupon I did immediately make such inventory as aforesaid; * that on the day of , 18 , I served upon the defendant, A. B., the summons hereto annexed, together with the annexed warrant, and the inventory of which the annexed is a certified copy, by delivering to, and leaving with him personally, a copy of each, duly certified by me.

Or, 1. Add after *, “that the said A. B., defendant, could not with reasonable diligence, be found within the county of , † and that I served the annexed summons and warrant of attachment, together with the inventory of which the annexed is a certified copy, by leaving a copy of each, duly certified by me, at the last place of residence of the said defendant, in the county of , with a person of suitable age and discretion, to wit, at , in said county. with C. D., a person of the age of , etc.”

Or, 2. Same as 1 above, adding after †, “and no person could be found at the last place of residence of said defendant, in said county, of suitable age and discretion with whom to leave copies thereof; and that I served the annexed summons and warrant of attachment, together with the inventory of which the annexed is a certified copy, by posting a copy of each, duly certified by me, on the outer door of the last place of residence of said defendant aforesaid; and, also, by depositing a copy of each, certified by me, in the post-office at , being the nearest post-office to said last place of residence, inclosed in a sealed post-paid wrapper, directed to the said defendant, , at , his place of residence.”

Or, 3. Same as 1 above to †, adding, “and has no place of residence therein, and that I served the annexed summons and warrant of attachment, together with the inventory of which the annexed is a certified copy, by delivering

to, and leaving with, E. F., the person in whose possession I found the said property, duly certified copies of each."

(Date and signature.)

No. 205.

Certificate of Copy Inventory, etc.

(See page 667.)

I certify that the foregoing (or annexed) is a true copy of the inventory of the property by me attached by virtue of the warrant of attachment, with a copy of which you are herewith served.

(Date and signature.)

(Of Copy Attachment.)

I certify that the foregoing (annexed or within) is a true copy of a warrant of attachment to me delivered for execution, in the action therein entitled.

(Date and signature.)

No. 206.

Return where Undertaking given by Defendant, in Attachment.

(See page 666.)

After return as in form No. 204, before signature, add, "That on the day of , 18 , the defendant (or A. L., the agent [or attorney] of the defendant), delivered to me the undertaking, which is returned herewith and delivered to the justice issuing said warrant, approved by said justice (or approved by me); that thereupon I delivered the said property so attached to the defendant, A. B."

(Date and signature.)

No. 207.

Undertaking by Defendant in Attachment; and Approval.

(See page 666.)

Know all men by these presents: That we, , are held and firmly bound unto , in the sum of (twice the

amount of the value of property attached or stated in inventory) to be paid to the said , or to his certain attorney, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of ,
18 .

The condition of this obligation is such, that if judgment is rendered in an action before , justice of the peace, in which is plaintiff, and , the above bounden (or, "of whom the above bounden is the agent" [or, "attorney in fact"]), is defendant, against said defendant, and execution is issued thereupon, within six months after the giving of this undertaking, and the property attached in said action shall be produced to satisfy the execution, then this obligation to be void, else to remain in full force.

(Signed and sealed, and acknowledgment and justification added, for which see form No. 79.)

(Approval of Above Undertaking of Constable.)

I approve of the sufficiency of the surety (or sureties) executing the foregoing (or within) undertaking.

Dated,

G. H., Constable.

(This undertaking may be executed by one or more sureties.)

No. 208.

Return on Attachment Where Claim and Bond by Third Person.

(See pages 666, 667.)

After return as in form No. 204, before signature add:
"That on the day of 18 , one claimed said property, and executed and filed with the justice issuing said attachment the bond required by section 2912 of the Code of Civil Procedure, which bond was approved by me (or by said justice), and that thereupon I delivered upon said property to said claimant.

(Date and signature.)

No. 209.

Bond by Third Person Claiming Property Attached.

(See pages 666, 667.)

This bond is the same as No. 206 down to condition: The approval, if by constable, is the same, and it may be executed by one or more sureties. The condition is as follows, to wit: "The condition of this obligation is such, that in an action to be commenced hereon within three months hereafter, the above bounden , who has claimed to be the general owner of the property attached in an action before , justice of the peace, in which is plaintiff, and is defendant (or of part of the property, describing it), the said claimant will, in such action, establish that he was the general owner of such property at the time of its seizure; or, if he fails so to do, that he will pay to the plaintiff aforesaid the value thereof, with interest."

(Sign and seal.)

Add justification and acknowledgment as in form No. 206.

No. 210.

Return on Process Directing Detention of Canal Boat, etc

(See page 668.)

I have served the within summons upon , by delivering to and leaving with him a copy thereof, and of the indorsement thereon, on the day of , 18 , at ; and, pursuant to the direction within contained, I did seize the within named boat (or float)* and have the same now in my possession.

Or, Add after * "and upon security approved by, and pursuant to the direction of, the magistrate issuing the within summons, I did release said boat (or float)."

Dated,

(Signed.)

No. 211.

Return in Replevin.

(See pages 670, 672.)

Same as form No. 95 for sheriff.

No. 212.*Certificate of Service of Subpœna.*

(See page 673.)

Served on the following persons at the times and places hereinafter stated, by reading (or stating the contents thereof) to each, and paying (or tendering) to each the sum set opposite or after his name, viz.:

On	, at	, on the	day of	. Sum
paid, \$.			
On	, at	, on the	day of	. Sum
paid, \$.			

J. B., *Constable.***No. 213.***Return on Warrant of Attachment against Witness.*

(See page 673.)

Same as form No. 201, omitting notification of plaintiff.

No. 214.*Return on Warrant for Collection of Fine.*

(See page 674.)

Same as form No. 219, *post.*

No. 215.*Return on Venire.*

(See pages 575, 576.)

I have executed the within venire this day of , 18 , by notifying each of the following named persons therein named that he was summoned as such juror, stating the title of the action, and the time and place of the trial, viz.: A. B., etc. (stating name of each juror summoned.)

(Signature.)

No. 216.*Indorsement of Levy Under Execution.*

(See page 680.)

Same as form No. 98.

No. 217.

Notice of Sale Under Execution, and of Adjournment.

(See pages 680, 681.)

Constable's Sale.

By virtue of an execution (or several executions) to me delivered, issued by _____, I have levied on and taken the following property, to wit (here describe) which I will sell at public auction, on the _____ day of _____, 18____, at o'clock ____ M.

Dated,

(Signature.)

(Notice of Adjournment.)

The foregoing sale is postponed to the _____ day of _____, 18____, at the same hour and place.

Dated,

(Signature.)

No. 218.

Indorsement of Receipt of Execution.

(See page 682.)

Same as form No. 96.

No. 219.

Return on Execution Against Property.

(See page 682.)

(Where Satisfied in Full.)

I have made the amount of the within execution of the goods and chattels of _____, defendant, and have paid the same to _____, the justice who issued this execution.

Dated,

Fees.

(Signature.)

Or, "Satisfied."

Dated,

Fees.

(Signature.)

(*Where Unsatisfied.*)

No goods or chattels of the within defendant , can be found.

Dated,

Or, "*Nulla Bona.*"

Fees.

R. J., *Constable.*

(*Where Partly Satisfied.*)

I have made the sum of dollars on the within execution, of the goods and chattels of , defendant, and have paid the same to , the justice who issued this execution ; and no other goods or chattels of , the defendant, can be found out of which to make the balance.

Dated,

Fees.

R. J., *Constable.*

(Where stayed by appeal or otherwise, see "Forms for Sheriffs.")

No. 220.

Return on Execution against Body.

(See pages 683, 684.)

(*No Property and no Body.*)

No goods or chattels of the within named defendant, , can be found out of which to make the within execution, or any part thereof ; and in default thereof the body of the within named defendant, , cannot be found.

(Date and signature.)

(*Where Satisfied out of Property.*)

Same as in form No. 218, in like case.

(*Where no Property; and Body is Taken.*)

No goods or chattels of the within named, , defendant, can be found out of which to make the within execution, and in default thereof I have arrested the said defendant, , and conveyed him to the jail of the county of , and have there delivered the body of said defendant, to-

gether with this execution, to the jailer (or deputy jailer) of said jail, and have taken his receipt therefor.

(Where Satisfied in Part out of Property, and Body Taken for Balance.)

Same as form No. 218, in like case, adding thereto as last above, inserting immediately after the words, "to make the," the words, "remainder of said execution."

(Add date, fees and signature.)

(On a Copy of the Execution and Return Left with Jailer, for Return to Justice)

Add, "the foregoing is a true copy of the execution this day left by me, together with the body of _____, with _____, jailer of the common jail of _____ county, together with the return thereon; and my fees thereon are \$ _____."

Dated,

R. J., Constable.

No. 221.

Indemnity Bond to Constable by Execution Plaintiff.

(See pages 686, 687.)

(The penal part, as in form No. 11, substituting, "constable of the town of," etc., for, "sheriff," etc.)

Whereas, an execution issued by _____, justice of the peace of the town of _____, county of _____, has been delivered to the said constable for execution, in which the above bounden, _____, is plaintiff, and _____, is defendant, and the amount to be made thereon is _____ dollars; and,

Whereas, the said constable has levied upon the following goods and chattels thereunder, to wit: (here describe property levied upon); and,

Whereas, _____ claims title thereto (or, "_____, the defendant, claims the said property to be exempt from execution"); and the said plaintiff insists that said levy be not released, but that said constable sell under said execution and levy.

Now, therefore, the condition of this obligation is such, that if the said , plaintiff, shall, at all times, keep and save harmless, and fully indemnify the said constable, his agents, and servants, of and from all damages, costs, suits, judgments, or other thing arising out of his failure to relinquish said levy, then this obligation to be void, else to remain in full force.

(Signed, sealed, acknowledged and justification, as in form No. 79.)

No. 222.

Summary Proceeding, for Land; Return on Precept, and Warrant.

(See page 688.)

For forms in summary proceedings for land, see Nos. 128, 129, *ante*.

No. 223.

Return on Warrant for Fines under Military Code.

(See page 688.)

See form No. 164, *ante*.

No. 224.

Return on Service of Summons for Refusal to Perform Highway Labor.

(See page 689.)

Personally served the day of , 18 .

Or, Served the day of , 18 , by leaving a copy at the personal abode of the defendant within named, at

Fees.

R. J., *Constable.*

For service on corporation, see form No. 199.

No. 225.*Return on Summons for Jury in Opening or Altering Highways.*

(See pages 689, 690.)

COUNTY OF _____, }
 Town of _____, } ss.:

I certify that I have executed the annexed summons, by personally notifying each of the persons named in the certificate hereto annexed of the time and place when and where the matter in which he was, by said summons, required to be and attend as a juror (excepting C. D., E. F. and E. G., in said certificate named, each of whom I summoned, as aforesaid, by leaving a written notice at his place of residence, with a person of proper age, which notice contained a statement that he was drawn as such juror, and designated the time and place when and where he was required to appear as such; and except E. H., who could not be found, and has no place of residence in the county, and E. J., who had removed from the county); that each of such persons were so summoned at least _____ days from the time, in said summons named, when said jurors were required to appear.

Dated,

Fees.

J. D., *Constable.***No. 226.***Written Notice to Juror in Opening, etc., Highway.*

(See pages 689, 690.)

To _____, *Esq.:*

SIR—Take notice, that you have been drawn as a juror in the matter of the application of A. B., to lay out a new road from _____ to _____ (or, “to alter the highway from _____ to _____”), and are summoned to be and appear and attend before _____, on the _____ day of _____, 18____, at _____ o’clock, _____ M., at _____.

Dated,

R. J., *Constable.*

No. 227.*Return to Precept for Jury in Case of Encroachment on Highway.*

(See pages 690, 691.)

Same as form No. 224, and notice to juror same as form No. 225, with change as to subject matter only.

No. 228.*Notice to Commissioners and Occupant of Meeting of Jurors, in Case of Encroachment.*

(See page 691.)

To _____, Commissioners of Highways of the Town of _____, and _____, occupant of Land on which Encroachment is Alleged:

Please take notice, that the jury drawn and summoned to inquire as to the alleged encroachment of (the fence, or, as the case may be) of _____, upon the highway leading from _____ to _____, will meet at _____, on the _____ day of _____, 18____, at _____ o'clock . M.

Dated,

Yours, etc.,

J. P., Constable,

No. 229.*Return on Precept in Case of Strays on Highways.*

(See pages 691, 692.)

(Where precept is directed to a person by name, and *personal service can be made*, same as form No. 198.)

(Where directed generally to all persons having an interest in the animal, etc., or where *personal service cannot be made*.)

Served by posting a copy thereof on the _____ day of _____, 18____, in six public and conspicuous places in the town of _____ (naming town where seizure was made), one of which places was upon the school-house in school district No. _____,

which is the nearest district school house to the place where such seizure was made (or, where the seizure was made within an incorporated village, having schools in charge of a board of education, "one of which places was upon a building in which a school in charge of the board of education in the village of is kept").

Dated,

(Signed.)

No. 230.

Notice of Sale of Distrained Property ; Return on Sale of.

(See page 693.)

Same as forms for Sheriff, Nos. 152, 153.

No. 231.

Return on Summoning Jury in Court of Special Sessions.

(See pages 695, 696.)

I certify that I have executed the within order to me delivered, by personally summoning the following, viz. (here name jurors summoned) to be and appear at the time and place named in the within order, for the purpose therein mentioned.

Dated,

R. J., *Constable.*

No. 232.

Affidavit as to Travel Fees.

(See page 713.)

County of , ss.:

J. P., being duly sworn, says, that miles travel was necessary to serve the annexed ; that no more miles are charged for in the service of the annexed than were actually and in good faith traveled for the purpose of

making such service; that he had, at the time of such travel, no other official or personal business upon the route so traveled, and that such traveling fees are charged on the annexed only.

J. P.

Subscribed and sworn to before me, }
this day of , 18 . }

No. 233.

In Criminal Cases Generally; Return on Warrants, etc.

The same as forms for Sheriff in like cases.

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